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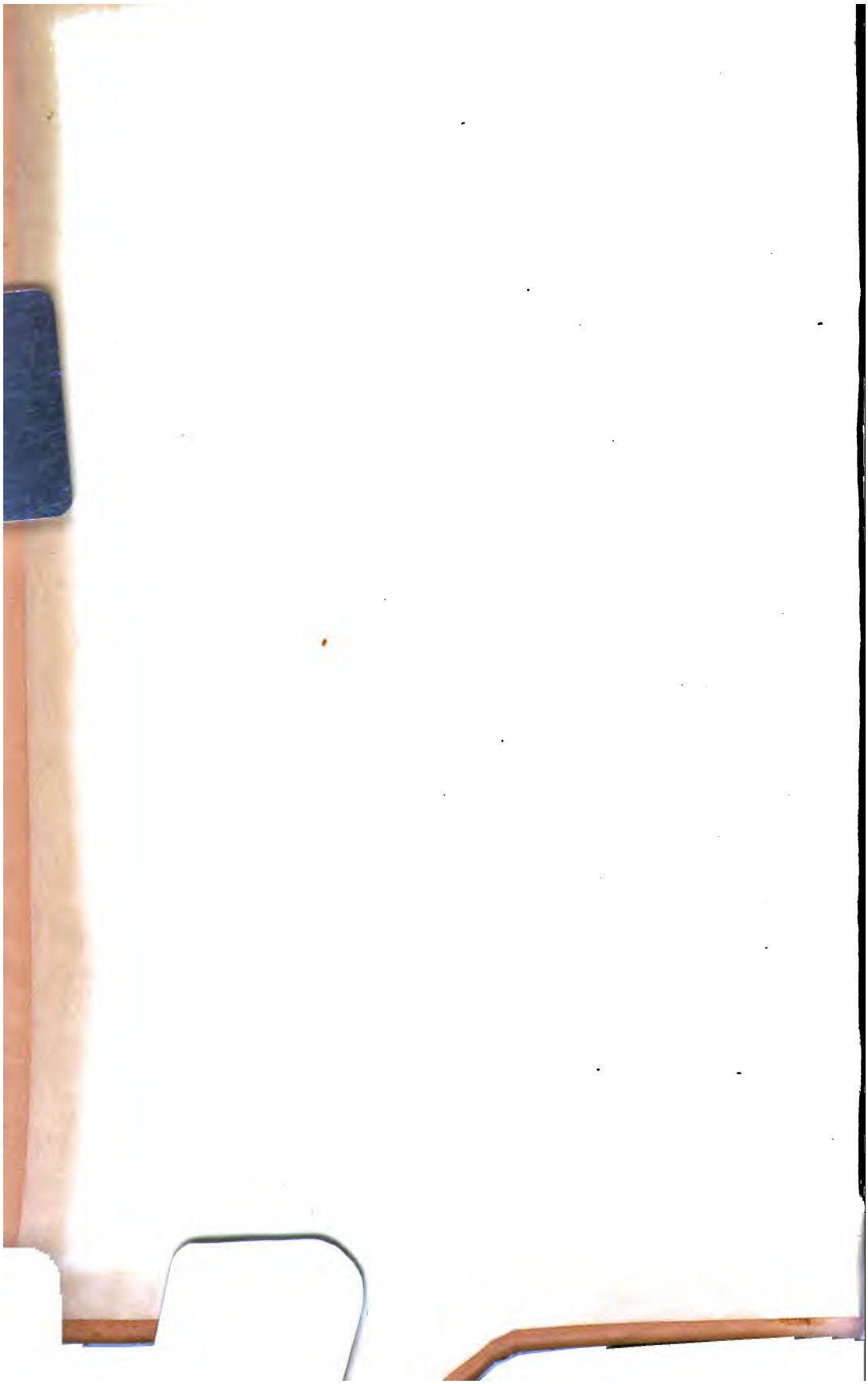

A TREATISE

ON THE LAW OF THE

EMPLOYERS' LIABILITY ACTS

OF

NEW YORK, MASSACHUSETTS, INDIANA ALABAMA, COLORADO, AND ENGLAND

Second Edition

BY

CONRAD RENO, LL. B.

Author of a Treatise on the Law of Non-Residents and Foreign Corporations
History of the Judicial System of New England, Etc.
and Member of the Boston Bar

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TO MY WIFE

PREFACE TO THE SECOND EDITION.

The New York Employers' Liability Act of 1902 is the fifth statute of this nature enacted in the United States. Massachusetts, Alabama, Indiana and Colorado have also Employers' Liability Acts. The English act of 1880 is still in force; but since the passage of the Workmen's Compensation Act, 1897, the Employers' Liability Act of 1880 has been very little resorted to.

The purpose and effect of all the Employers' Liability Acts are to extend the common-law rights of employees and the liability of employers for personal injuries suffered by employees. Several classes of persons for whose negligence causing injury to a coemployee the common employer was not liable at common law because they were fellow servants, are now under these acts "superintendents," or acting superintendents, or persons having the "charge or control," for whose negligence the common employer is liable in damages to an employee injured thereby.

The New York act of 1902, ch. 600, section 3, contains a new provision not found in the earlier acts concerning the defenses of assumption of risk and contributory negligence. It declares that the question of the employee's "continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact." It abrogates the rule that, in many cases of this character, the question was one of law for the court, and it prevents the presiding justice from directing a verdict

for the defendant upon the ground that such conduct on the plaintiff's part was either an assumption of the risk or contributory negligence. The court, however, still possesses the power "in a proper case to set aside a verdict rendered contrary to the evidence."

The method of treatment is concrete concerning matters relating directly to the subject of Employers' Liability Acts, and abstract concerning collateral and incidental matters. The questions arising out of the former class are elaborated and illustrated by statements of facts and reasons of decided cases, while questions arising out of the latter class are discussed briefly in general terms and with few illustrations. The book is designed especially for the use of the practicing lawyer.

The index has been carefully prepared. The leading clauses of the acts are given as titles, and the general provisions may be found under the title of "Employers' Liability Acts." The principal and peculiar provisions of each state's law are indexed under the titles, "New York," "Massachusetts," "Alabama," "Indiana" and "Colorado."

The appendix contains the text of the different Employers' Liability Acts.

The table of cases cited contains about two thousand cases, as compared with nine hundred cases in the first edition, published in 1896.

Many new sections have been added and old sections rewritten and enlarged, increasing the size of the book about two hundred pages.

CONRAD RENO.

Hemenway Building, 10 Tremont Street,
BOSTON, January 1, 1903.

PREFACE TO THE FIRST EDITION.

The present stage of development and practical importance of Employers' Liability Acts seem to warrant the publication of an American work upon the subject. The English Employers' Liability Act of 1880 has been followed in the United States by the Alabama Act of 1885, the Massachusetts Act of 1887, and the Colorado and Indiana Acts, both passed in 1893. Many decisions of the highest courts in these jurisdictions have been rendered in actions brought under these statutes, and many questions are now settled. Though differing somewhat in details, these statutes agree in their main features, and all have the effect of extending the common-law liability of employers for personal injuries suffered by their employees. In some directions the enlargement of the employee's rights has been considerable. The most important provisions are those which give the employee a right of action against his employer for injuries caused by reason of the negligence of the employer's superintendent, and, in the case of railroad-employees, for injuries caused by reason of the negligence of any person having the charge or control of certain railroad instrumentalities. The rights and liabilities peculiar to railroad-employees and employers are considered in Chapter V, and the negligence of superintendents in Chapter IV.

The author has endeavored to treat the important questions with fulness and thoroughness, in many instances

stating the facts of adjudications and the reasoning of the courts in their own language. Less important matters have been treated with less particularity. It is believed that the common-law principles of employers' liability have been stated with sufficient fulness to render clear the advance made by the Employers' Liability Acts. More attention has been given to the common law of the states having such statutes than to that of other states.

Much care has been given to the discussion of the question relating to what facts will or will not justify the presiding justice in withdrawing the case from the jury, and Chapters XII, XIII, and XIV are devoted to this question.

The doctrines of assumption of risk and Volenti non fit injuria have been fully considered.

The appendix contains the text of the various Employers' Liability Acts, with amendments to January 1, 1896. The table of cases cited contains upwards of nine hundred cases, many of which are cited more than once in support of different propositions. The index has been carefully prepared.

CONRAD RENO.

Equitable Building, 150 Devonshire Street,
BOSTON, March 20, 1896.

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EMPLOYERS' LIABILITY ACTS.

CHAPTER I.

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§ 1. Employers' Liability Acts, construed in what spirit. —In Massachusetts it has been decided that the statute should be liberally construed in favor of employees. The main purpose of the act, as its title indicates, is to extend the liability of employers, and to render them liable in damages for certain classes of personal injuries to their employees for which they were not liable at common law prior to the passage of the act. It does not attempt to codify the whole law upon the subject, nor to restrict the employee's right of action to the cases mentioned in the act. If he could have recovered before the passage of the act, he can also recover since its passage.[1]

The Alabama Employers' Liability Act has not been construed quite so liberally. In Mobile &c. R. Co. v. Holborn (Ala.),[2] the court, by Mr. Justice Clopton, says: "Being in derogation of the common law, the inference is, that the terms of the act clearly import the changes intended, and their operation will not be enlarged by con-

[1] Ryalls v. Mechanics' Mills, 150 Mass. 190; 22 N. E. 766; 5 L. R. A. 667; Coughlin v. Boston Tow-Boat Co., 151 Mass. 92; 23 N. E. 721; Clark v. Merchants' &c. Co., 151 Mass. 352; 24 N. E. 49.

[2] 84 Ala. 133, 134; 4 So. 146.

struction further than may be necessary to effectuate the manifest ends. Notwithstanding, a narrow and restrictive view of the act should not be taken. In its construction the court should consider its objects, have regard to the intentions of the legislature, and take a broad view of its provisions commensurate with the proposed purposes."

In Lovell v. De Bardelaben Coal Co. (Ala.),[1] the court says, by Mr. Justice McClellan: "It [the statute] relates to a class of cases in which before no cause of action existed,—to a class of injuries the damages for which, at common law and under our statutes, had been bartered away before they accrued. The statute was one of enlargement purely. No existing right was curtailed, limited, or taken away. The only limitations in the act were upon causes of action created by the act, and having no existence outside of it."

With respect to the English act of 1880, the rule of construction has been thus stated by Brett, M. R., in Gibbs v. Great Western R. Co.:[2] "This act of parliament having been passed for the benefit of workmen, I think it the duty of the court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by parliament should be given to them, and therefore, as largely as reason enables one, to construe it in their favor and for the furtherance of the object of the act."

The Indiana act is regarded as in derogation of the common law, and the supreme court has said that it "must be strictly construed."[3]

In Hunt v. Conner (Ind.),[4] it was said by Mr. Justice

[1] 90 Ala. 13, 17; 7 So. 756.

[2] 12 Q. B. D. 208, 211.

[3] Hodges v. Standard Wheel Co., 152 Ind. 680, 690; 52 N. E. 391; 54 N. E. 383.

[4] 26 Ind. App. 41, 44; 59 N. E. 50 (1901).

Black for the court, in relation to the Indiana Employers' Liability Act: "Though the statute thus effects a change in the common law, it is a remedial act, and for the purpose of advancing the remedy and carrying into effect the true beneficial purpose, it should be liberally construed with reference to the object uppermost in the mind of the lawmaker."

In New York it has been ruled by the court of appeals that when the case requires a construction to be given to the statute of another state, the construction placed upon the statute by the courts of that state is generally controlling and will be adopted by the New York courts;[1] that "words having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in the statutes, unless a different meaning is unmistakably intended;"[2] that when a statute is remedial in its character, it should be liberally construed with a view to the beneficial end proposed by the legislature;[3] that a statute in derogation of the common law, or changing the common law, will be strictly construed;[4] that the act of 1889, ch. 380, to regulate the rate of wages on all public works should be strictly construed so that it will not be extended to cases not plainly within the legislative intent, because it conferred special privileges upon a certain class of laborers within the state.[5]

[1] Jessup v. Carnegie, 80 N. Y. 441; 36 Am. R. 643 (1880); York v. Conde, 147 N. Y. 486; 42 N. E. 193 (1895).

[2] Perkins v. Smith, 116 N. Y. 441, 448; 23 N. E. 21 (1889), per Follett, C. J.; citing Stephenson v. Hinginson, 3 H. L. Cas. 638.

[3] Allen v. Stevens, 161 N. Y. 122, 143; 55 N. E. 568 (1899); Hudler v. Golden, 36 N. Y. 446 (1867).

[4] Dean v. Metropolitan Elevated Ry., 119 N. Y. 540, 547 (1890); Fitzgerald v. Quann, 109 N. Y. 441, 445; 17 N. E. 354 (1888).

[5] Drake v. State, 144 N. Y. 414, 417; 39 N. E. 342 (1895); Clark v. State, 142 N. Y. 101; 36 N. E. 817 (1894).

§ 2. Statutory right not identical with common-law right of action.—The right of an employee to maintain an action against his employer, under the Employers' Liability Acts is not identical with his right to maintain an action at common law. It may be greater or it may be less.[1] In some cases he stands a better chance of recovery at common law than under the statute. In such cases it is best to frame the count on the common-law liability, as then the plaintiff is not obliged to give notice of the injury, and the amount recoverable is not limited. Where the question is doubtful, however, the safer way is to join a common-law count with a count on the statute in the same action. The plaintiff may also describe his cause of action as falling within the terms of two or more sections or clauses of the statute, in different counts of the same declaration.[2]

§ 3. Prior construction followed.—As the Massachusetts act is copied verbatim from the English act of 1880, with only a few variations in matters of detail, the construction given to the English act, before the adoption of the Massachusetts act, is important if not controlling in determining the construction to be given to the same terms in the Massachusetts act.

[1] Coffee v. New York &c. R. Co., 155 Mass. 21, 22; 28 N. E. 1128; Lynch v. Allyn, 160 Mass. 248, 252; 35 N. E. 550.

[2] Beauregard v. Webb Granite &c. Co., 160 Mass. 201; 35 N. E. 555; Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714; Highland Avenue &c. R. Co. v. Dusenberry, 94 Ala. 413, 418; 10 So. 274.

[3] Ryalls v. Mechanics' Mills, 150 Mass. 190, 191; 22 N. E. 766; 5 L. R. A. 667; Mellor v. Merchants' Mfg. Co., 150 Mass. 362, 363; 23 N. E. 100; 5 L. R. A. 792. In Commonwealth v. Hartnett, 3 Gray (Mass.) 450, it was held that the decisions of the English courts, that the wife of the owner of a building was not within the terms of a statute which prohibited larceny in a building, would be followed in the construction of the later Massachusetts act of the same purport. In delivering the opinion of the court, Metcalf, J., says: "It is common learning, that the adjudged construction of the terms of a statute is enacted, as well

The Alabama statute of 1885, as far as it goes, is a substantial copy of the English act of 1880. Some of the provisions of the English act had received judicial construction before the passage of the Alabama act. It has accordingly been held that the subsequent enactment by the Alabama legislature is persuasive evidence of a legislative adoption of the prior English construction.[1]

The rule has been thus stated by Mr. Justice Coleman, speaking for the court, in Birmingham R. &c. Co. v. Allen (Ala.):[2] "The Employers' Act, as found in section 2950 and subdivisions, is a substantial if not an exact copy of the English act of 1880. This court is not finally concluded by the decision of any other state court, or the British court, in their construction of a similar statute; but the opinions of learned courts upon similar questions are entitled to great weight, and this is especially true when the statute from which ours was copied had been construed prior to its enactment by our legislature."[3]

In Alabama it has been further decided that after the supreme court had construed the Employers' Liability Act and the legislature re-enacted the clause without changing the phraseology, the prior construction thereby became a part of the statute itself.[4]

The Colorado Employers' Liability Act of 1893 was copied from the Massachusetts act of 1887, and the Colo-

as the terms themselves, when an act which has been passed by the legislature of one state or country is afterwards passed by the legislature of another. . . . For, if it were intended to exclude any known construction of a previous statute, the legal presumption is that its terms would be so changed as to effect that intention." Page 451.

[1] Mobile &c. R. Co. v. Holborn, 84 Ala. 133, 134; 4 So. 146.

[2] 99 Ala. 359, 371; 13 So. 8; 20 L. R. A. 457.

[3] Citing Armstrong v. Armstrong, 29 Ala. 538. See also, Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 246; 12 So. 88.

[4] Southern R. Co. v. Moore, 128 Ala. 434; 29 So. 659 (1901); Richmond &c. R. Co. v. Freeman, 97 Ala. 289, 296; 11 So. 800 (1893).

rado legislature "presumably adopted the act with the construction that had been given it by the courts of that state."[1] "This being the case," says Mr. Justice Wilson, "prior construction by the English and Massachusetts courts of the acts within their respective jurisdictions is important in determining the construction to be given to the same terms in our own statute. Whilst it may not be conclusive, the subsequent enactment of the statute by the Colorado legislature is strong persuasive evidence of the legislative adoption of these prior constructions of the terms, as well as the intent and purpose of the act, and the rules by which it should be construed."[2]

So, when congress adopts the language of an English statute, the federal courts will presume that it had in mind the construction given by the English courts, and intended to incorporate it into the statute.[3] So, likewise, where the legislature of one state adopts the language of a statute of another state, it is presumed to incorporate the construction given to the statute by the prior decisions of the courts of such other state.[4]

§ 4. **No retrospective operation.**—The first section of the Massachusetts act of 1887 expressly provided that "where, *after the passage of this act*, personal injury is caused to an employee," etc., he may maintain an action therefor in the cases specified. The New York act of 1902, ch. 600, § 1, reads, "where, after this act takes *effect*, personal injury is caused to an employee," etc. It follows that the statute does not give a right of action for

[1] Colorado Milling &c. Co. v. Mitchell, 26 Colo. 284, 289; 58 Pac. 28 (1899), per Goddard, J.

[2] Mitchell v. Colorado Milling &c. Co., 12 Colo. App. 277, 281; 55 Pac. 736 (1898).

[3] Interstate Commerce Com. v. Baltimore &c. R. Co., 145 U. S. 263; 12 S. Ct. 844; McDonald v. Hovey, 110 U. S. 619; 4 S. Ct. 142.

[4] Missouri Pacific R. Co. v. Haley, 25 Kan. 35, 53.

injuries received before its passage. Its operation is merely prospective and not retrospective.

The Alabama act of 1885 does not expressly limit its operation to subsequent injuries; nor does it declare that it shall apply to prior injuries. The well-settled rule in like cases is that, unless there is something in the act to show that the legislature intended to give a new remedy for prior acts of negligence, the statute will be construed as merely prospective in its operation.[1] Applying this rule to the Alabama act, the conclusion is that it does not give a right of action for injuries received before the statute took effect. But the operation of the statute upon subsequent injuries is not prevented by the fact that the employee was working under a contract entered into prior to the passage of the act.[2]

§ 5. To what classes of employees the Employers' Liability Acts apply.—The various statutes differ considerably with respect to the classes of persons entitled to their benefit. The acts of New York, Alabama and Colorado apply to all classes of employees and contain no exceptions. The Massachusetts act applies to all classes, except domestic servants and farm laborers, injured by other fellow employees.[3] The Indiana act applies merely to employees of railroad and other corporations, except municipal, operating in the state, and does not extend to the employees of firms or of individuals.[4] The English act applies to railway servants, and to any person to whom the Employers and Workmen Act, 1875, applies.[5]

[1] Kelley v. Boston &c. R. Co., 135 Mass. 448; Read v. Boston &c. R. Co., 140 Mass. 199; 4 N. E. 227.

[2] Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 137; 11 So. 803; 18 L. R. A. 433; 38 Am. St. 163.

[3] Mass. St. 1887, ch. 270, § 7.

[4] Burns R. S. Ind. 1901, § 7083.

[5] 43 & 44 Vict., ch. 42, § 8. See Morgan v. London Omnibus Co., 13 Q. B. D. 832; Yarmouth v. France, 19 Q. B. D. 647.

A state statute, giving a right of action for a personal injury in general terms, applies to citizens of other states injured within the state, as well as to citizens of the state in question. It has even been intimated that a statute which purported to limit the right to citizens of the state, and to exclude citizens of other states, would contravene section 2 of article 4 of the United States constitution, declaring that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[1]

The supreme judicial court of Maine has held that a statute which limits the right to recover damages for defects in a highway to persons who were not residents of any country where damage done under similar circumstance is not recoverable by the laws of that country, is void, as denying the equal protection of the laws of Maine to persons within its jurisdiction.[2]

Upon the question of whether or not a non-resident alien is entitled to the benefit of an Employers' Liability Act, there exists a difference of opinion among the courts. In an action brought in Massachusetts under the Employers' Liability Act by an Irish woman for causing the death of her son, it was held that the statute conferred a right to sue upon a non-resident alien, and that the plaintiff was entitled to recover, as the country of her domicil did not object to any such right.[3]

A similar decision has also been rendered upon the Massachusetts act by the United States circuit court for the district of Massachusetts.[4]

[1] Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48, 71.

[2] Pearson v. City of Portland, 69 Me. 278; 31 Am. R. 276 (1879).

[3] Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 386.

[4] Vetaloro v. Perkins, 101 Fed. 393. To the same effect upon other statutes are the following cases: Pearson v. City of Portland, 69 Maine 278; 31 Am. R. 276 (1879); Luke v. Calhoun Co., 52 Ala. 115, 118, 120 (1868); Philpot v. Missouri Pac. R. Co., 85 Mo. 164; Chesapeake &c. R.

On the other hand, a general grant of a right of action by statute has been held in Pennsylvania and some other jurisdictions to confer no right to sue upon non-resident aliens.[1]

In Deni v. Pennsylvania R. Co. (Pa.),[2] a non-resident alien brought an action for causing the death of her son under the Pennsylvania statute of 1855, similar to Lord Campbell's Act of England. It was held that although the statute did not expressly prohibit a non-resident alien from maintaining such an action, the spirit and the policy of the statute required the court to hold that a non-resident alien was not entitled to its benefit, and therefore that the action could not be maintained.[3]

§ 6. To what classes of employers the Employers' Liability Acts apply—Receivers.—Ordinarily it is not difficult to tell whether the employer of the injured employee falls within the terms of the Employers' Liability Act in question.

These acts, however, do not in express terms apply to receivers, and some difference of opinion has arisen upon the question of a receiver's liability to suit under such statutes. In Georgia and Texas it has been decided that a receiver, not being named in the statute, is not liable, though the legislature of Texas has since imposed a liability upon the receiver.[4]

The better rule, however, which has also been applied

Co. v. Higgins, 85 Tenn. 620,622; 4 S. W. 47; Augusta R. Co. v. Glover, 92 Ga. 132, 142; 18 S. E. 406 (1892); State v. Montgomery, 94 Me. 192; 47 Atl. 165 (1900).

[1] Deni v. Pennsylvania R. Co., 181 Pa. St. 525; 37 Atl. 558; 59 Am. St. 676; Brannigan v. Union Gold Mining Co., 93 Fed. 164; Adam v. British and Foreign Steamship Co., 79 L. T. (N. S.) 31.

[2] 181 Pa. St. 525; 37 Atl. 558; 59 Am. St. 676.

[3] Compare with this decision the case of Knight v. West Jersey R. Co., 108 Pa. St. 250; 56 Am. R. 200.

[4] Henderson v. Walker, 55 Ga. 481; Turner v. Cross, 83 Texas 218; 18 S. W. 578; 15 L. R. A. 262.

specifically to Employers' Liability Acts, is that the receiver, whether appointed by a state court or by a federal court, is liable, though unnamed in the statute. He is not sued in his personal capacity, but in his official character; and the damages do not come out of his private funds, but out of the property in his hands or custody belonging to other persons. He is a representative in the sense that an executor or administrator is a representative. The mere circumstance that a corporation has ceased to do business in its own name, through a receivership, should not exempt the corporate property from liability for torts, though the negligence is that of a person technically in the receiver's employ. It would be contrary to public policy to allow the stockholders to escape liability in this way, for if the injured employee has no remedy by suing the receiver, he has, generally speaking, no means of redress, and the corporate property becomes exempt.[1]

A receiver of a railroad corporation is subject to action by an employee for personal injuries under Missouri Laws 1897, p. 96, relating to the liability of railroad companies to their employees.[2] In the case just cited, the ruling of the supreme court of Texas in Campbell v. Cook,[3] that a brakeman in the service of a receiver of a railway corporation was not "in the service of a railway

[1] Hunt v. Conner, 26 Ind. App. 41; 59 N. E. 50 (1901) (Indiana Employers' Liability Act); Malott v. Shimer, 153 Ind. 35; 54 N. E. 101 (1899) (suit against federal receiver without leave); Wall v. Platt, 169 Mass. 398; 48 N. E. 270; Mikkelson v. Truesdale, 63 Minn. 137; 65 N. W. 260 (1895) (fellow-servant act of Minnesota); Farrell v. Union Trust Co., 77 Mo. 475; Bartlett v. Keim, 50 N. J. L. 260; 13 Atl. 7; Sloan v. Central Iowa R. Co., 62 Iowa 728; 16 N. W. 331 (1883); Rouse v. Harry, 55 Kan. 589; 40 Pac. 1007 (1895); Peirce v. Van Dusen, 78 Fed. 693; 24 C. C. A. 280 (1897) (fellow-servant act of Ohio); Thompson Corp., § 7159; Elliott Railroads, § 1341.

[2] Powell v. Sherwood, 162 Mo. 605; 63 S. W. 485 (1901).

[3] 86 Tex. 630; 26 S. W. 486; 40 Am. St. 878.

corporation" within the meaning of the Texas railroad act, was disappoved by the supreme court of Missouri (p. 613).

In Wall v. Platt (Mass.),[1] an action of tort was brought against a receiver appointed by the United States circuit court for the district of Massachusetts, to recover under a statute which imposed a liability upon every railroad corporation for fire communicated by its locomotive engines. The defense was that the statute does not apply to receivers because they are not expressly mentioned in the statute. The court held, however, that the statute was a remedial one, and should therefore be liberally construed so as to advance the remedy and carry out the object which the legislature had in view in enacting the law. Mr. Justice Morton, in delivering the opinion of the court (page 400), says:

"Though appointed by a court and acting as its officers, the receivers of a railroad corporation, who are authorized to operate and manage a railroad, stand for the time being in many important respects in the place of the corporation itself. They have sole possession of the railroad and of the property belonging to the corporation. They run trains, carry passengers, transport freight, and conduct in the usual manner those active operations for which the railroad was intended and constructed. They act as common carriers by virtue of and under the franchise conferred on the corporation, and as such, so far as the public is concerned, are subject to the same duties and liabilities in very many if not in all respects, to which the corporation is subject, and which are imposed on it by the exercise of the power conferred by the franchise.[2] They receive the earnings, and apply them under the di-

[1] 169 Mass. 398; 48 N. E. 270.

[2] Citing Central Trust Co. v. New York &c. R. Co., 110 N. Y. 250, 257; 18 N. E. 92; 1 L. R. A. 260.

rection of the court to the expenses of operating the railroad, to the preservation of the property and franchise, to the payment of the debts, and to other purposes which immediately benefit the corporation, and are such as the corporation itself would apply them to. The property of the corporation is liable for their contracts in the business of operating and managing the railroad, and for their misfeasances and nonfeasances, and those of their servants and agents, as it would be for those of the corporation itself, and for those of the corporation's own managers or servants."[1]

§ 7. Contracting out of the statute, or waiving its benefit.—In England it has been held that it is not contrary to the policy of the statute to allow an employee to waive the benefit of the act by contract, and that such a contract is binding not only upon the employee himself, but also upon his representatives.[2] In the English act of 1880, under which Griffiths v. Dudley[3] was decided, there was no clause prohibiting the making of such a contract.

In Alabama, however, under its Employers' Liability Act, although it contains no clause expressly avoiding contracts waiving the benefit of the act, it has been held that such a contract is void as contrary to public policy. In Hissong v. Richmond &c. R. Co. (Ala.),[4] a switchman was injured while coupling cars, through the negligence of the engineer. One of the conditions of the contract of employment was "that the regular compensation paid for the services of employees shall cover

[1] Citing NcNulta v. Lochridge, 141 U. S. 327, 331, 332; 12 S. Ct. 11; Texas &c. R. Co. v. Cox, 145 U. S. 593, 607; 12 S. Ct. 905; Nichols v. Smith, 115 Mass. 332; Paige v. Smith, 99 Mass. 395; Murphy v. Holbrook, 20 Ohio St. 137.

[2] Griffiths v. Dudley, 9 Q. B. D. 357. But see Baddeley v. Granville, 19 Q. B. D. 423, 426, 427.

[3] 9 Q. B. D. 357.

[4] 91 Ala. 514; 8 So. 776.

all risks incurred, and liability to accident from any cause whatever. If an employee is disabled by accident or other cause, the right to claim compensation for injuries will not be recognized." In holding this contract void, the court, by Clopton, J., says on page 517: "The statute makes the employer answerable in damages when an employee is injured in any of the classes of negligence specified therein. Such a stipulation being in contravention of the statutory provisions, is opposed to public policy, and does not avail to secure non-liability for an injury caused to an employee by defendant's own negligence or misconduct in the cases specified in the statute."[1]

This view is more in line with the general current of authority, and seems better than the English doctrine.

In line with these decisions, it has been subsequently held that the rights and liabilities conferred and imposed by the statute do not spring from the contract of employment, and that the only office of the contract is to establish the relation of master and servant. "Finding this relation, the statute imposes certain duties and limitations on the parties to it, wholly regardless of the stipulations of the contract as to the rights of the parties under it, and, it may be, in the teeth of such stipulations."[2] It was accordingly held that the making and part performance of the contract of service in Alabama did not give an employee a right of action under the Alabama statute for an injury received in Mississippi, in which latter state there was no Employers' Liability Act.

§ 8. Same—Prohibition by statute.—By statute in some states an employee does not lose the benefit of the Employers' Liability Act by contracting in advance to waive

[1] See also, Richmond &c. R. Co. v. Jones, 92 Ala. 218; 9 So. 276.

[2] Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 138; 11 So. 803; 18 L. R. A. 433; 38 Am. St. 163, per McClellan, J., for the court.

its benefit; such a contract in advance of injury is contrary to public policy as expressed in the statute, and constitutes no defense to an action for the injury. Such statutes do not work an unconstitutional interference with the liberty or freedom of contract, and are constitutional, even when applied to interstate contracts.[1]

In Indiana, whose act applies to all corporate employers except municipal corporations, the fifth section provides that—

"All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void."[2]

In Iowa, the railroad act declares that "no contract which restricts such liability shall be legal or binding."[3]

In Massachusetts a statute passed in 1877, ten years prior to the Employers' Liability Act, declares that—

"No person or corporation shall, by a special contract with persons in his or its employ, exempt himself or itself from any liability which he or it might otherwise be under to such persons for injuries suffered by them in their employment, and which result from the employer's own negligence, or from the negligence of other persons in his or its employ."[4]

Though the point has not yet been raised, it would probably be held that this statute applies to a right of action conferred by the Employers' Liability Act, as well

[1] Pierce v. Van Dusen, 78 Fed. 693 (1897); Chicago &c. R. Co. v. Solan, 169 U. S. 133; 18 S. Ct. 289; affirming s. c. sub nom. Solan v. Chicago &c. R. Co., 95 Iowa 260; 63 N. W. 692; 58 Am. St. 430; 28 L. R. A. 718 (1895); Powell v. Sherwood, 162 Mo. 605; 63 S. W. 485 (1901).

[2] Burns R. S. Ind. 1901, § 7087.

[3] Iowa Rev. Code 1880, § 1307. See also, Texas Acts of 1891, ch. 24, § 3; Florida Acts of 1891, No. 62, May 4, 1891; Wyoming Acts of 1891, ch. 28.

[4] Pub. Sts., ch. 74, § 3; St. 1877, ch. 101, § 1.

as to a right of action existing independently of that act. In either case, a contract exempting the employer from liability would probably be void, and no defense to an action. In 1894 this statute was re-enacted in the same terms.[1]

The case of Shaver v. Pennsylvania Co.[2] contains a dictum by Mr. Justice Ricks that a statute prohibiting the making of a contract by which the employee waives in advance the right to recover damages for negligence of a fellow servant, is contrary to the 14th amendment, as depriving persons of their liberty of contract without due process of law. In a later case, however, decided by the circuit court of appeals, it was held that the same clause of the Ohio Fellow-Servant Act was constitutional.[3]

The defense of assumption of risk may be materially strengthened by an express contract between the parties,

[1] St. 1894, ch. 508, § 6; Revised Laws of 1902, ch. 106, § 16.

But a contract that an employee will not hold the employer liable for the obvious risks of the business which he undertakes is not within the meaning of this statute and is valid, because an employer is not liable for an injury caused by an obvious danger, either at common law or under the Employers' Liability Act. In O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 137; 32 N. E. 1119, Knowlton, J., says for the court:—

"We have no doubt that one may expressly contract to take the obvious risks of danger from inferior or defective machinery, as well since the enactment of this statute [Employers' Liability Act] as before. If he does so, his employer owes him no duty in respect to such risks, and, if he is hurt from a cause included in the contract, the defect is not within the terms of the statute: the maxim, Volenti non fit injuria, applies, and he can not recover."

The point decided in the case just cited was that the law implied such a contract; and that an employee could not recover for an injury received in falling off his employer's coal-run, which was not protected by a guard. When, however, the employer has committed a breach of an express statutory duty, the maxim does not apply, and will not relieve him from liability under the Employers' Liability Act: Baddeley v. Granville, 19 Q. B. D. 423. See further, §§ 109, 229, 230, post.

[2] 71 Fed. 931 (1896).

[3] Peirce v. Van Dusen, 78 Fed. 693; 24 C. C. A. 280 (1897).

and such contract is not contrary to a statute of this nature.

In Quinn v. New York &c. R. Co. (Mass.),[1] the plaintiff, in his written application for employment as a brakeman, agreed to make a careful examination of all things near the tracks of the defendant's railroad, so that he might understand the dangers attending them. While sitting on the top of a large fruit-car in motion, his head struck the cornice of a roof over a station platform, and he was knocked off and hurt. He knew that this roof existed at this place, not far from the cars, and that there was danger from it, and that he was approaching the place on a car larger than usual. It was held that the plaintiff assumed the risk as matter of law; that the contract conduced to this conclusion; and that the contract was not invalid under Pub. Stats., ch. 74, § 3; Mass. St. 1894, ch. 508, § 6; Revised Laws of 1902, ch. 106, § 16.

In Missouri &c. R. Co. v. Wood (Tex.),[2] a brakeman agreed not to attempt to couple or uncouple cars unless he knew that the coupling was in proper condition. It was held that such a contract did not relieve the railroad employer from the duty which the law imposes upon every master to see that the implements furnished the employee are in a reasonably safe state of repair.

In actions under Mass. Public Statutes, ch. 112, § 212, giving a right of action for the benefit of the widow and children or next of kin of a person killed by the negligence of a railroad company, it has been decided that a release of damages given by the deceased does not release the company from liability or prevent a recovery, because the amount recovered is "in substance a penalty given to

[1] 175 Mass. 150; 55 N. E. 891.
[2] (Tex. Civ. App.) 35 S. W. 879

the widow and children and next of kin, instead of to the commonwealth.'"[1]

§ 9. Common-law rules as to exempting employer from liability for negligence.—Irrespective of statute it has been generally held in the United States that a contract made in advance whereby an employee agrees to release and discharge his employer for any injury he may receive by reason of the negligence of his employer, or of his servants, is contrary to public policy and void.[2] A contrary rule prevailed, however, in Georgia,[3] until 1895, when it was changed by statute.[4]

In New York the decisions indicate a tendency to hold that a contract made in advance of a personal injury waiving or releasing the employer from liability for negligence occasioning injury to his employee is contrary to public policy and no defense to an action therefor.[5]

The New York Employers' Liability Act of 1902 does not contain any express clause invalidating such contracts, but under the decisions just cited it seems that an employer can not escape liability in actions brought under the act by obtaining such a contract from his employee.

[1] Doyle v. Fitchburg R. Co., 162 Mass. 66, 71; 37 N. E. 770; 25 L. R. A. 157; 44 Am. St. 335, per Morton, J. See also, Commonwealth v. Vermont &c. R. Co., 108 Mass. 7; 11 Am. R. 301.

[2] Roesner v. Herman, 8 Fed. 782; Railway Co. v. Spangler, 44 Ohio St. 471; 8 N. E. 467; Kansas Pacific R. Co. v. Peavey, 29 Kan. 169; 44 Am. R. 630; 34 Kan. 472; 8 Pac. 780; Little Rock &c. R. Co. v. Eubanks, 48 Ark. 460; 3 Am. St. 245; 3 S. W. 808; 2 Thompson Neg. (1st ed.) 1025 (criticising Western &c. R. Co. v. Bishop, 50 Ga. 465, and later Georgia cases); Johnson v. Richmond &c. R. Co., 86 Va. 975; 11 S. E. 829; Richmond &c. R. Co. v. Jones, 92 Ala. 218; 9 So. 276; Purdy v. Rome &c. R. Co., 125 N. Y. 209; 26 N. E. 255; 21 Am. St. 736; Runt v. Herring, 49 N. Y. St. 126; 21 N. Y. Supp. 244.

[3] Western &c. R. Co. v. Bishop, 50 Ga. 465; Fulton Bag &c. Mills v. Wilson, 89 Ga. 318; 15 S. E. 322.

[4] Georgia Laws 1895, p. 97.

[5] Purdy v. Rome &c. R. Co., 125 N. Y. 209; 26 N. E. 255; 21 Am. St. 736; Runt v. Herring, 49 N. Y. St. 126; 21 N. Y. Supp. 244.

In Bailey on Master's Liability, the Georgia rule is approved; and it would seem that the learned author is of opinion that a state statute which expressly prohibits the making of such a waiving-contract is itself contrary to public policy and void, as applied to such risks as the employee impliedly assumed at common law. Thus, on pages 478, 479, it is said: "Courts, in giving to such statutes the force of prohibiting the assumption of those risks by express terms in a contract which were impliedly assumed at common law by the ordinary contract of service, upon the ground that such contracts are against public policy, must in effect declare that the common law was against public policy." And on page 480 it is said: "An act can not be made against public policy by a simple declaration that it is so."

The learned author seems to overlook the well-settled principles of law that the legislature, and not the court, is the final judge of public policy; that it has the power to change the rule of public policy at any time, whether the former rule was of common law or of statutory origin; that the legislature's decision upon this question is binding upon the courts; and that no statute can be declared void by the courts on the ground that it is contrary to public policy.[1]

In the License Tax Cases, ubi supra, Mr. Chief Justice Chase, in delivering the opinion of the court, says on page 469: "The legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery-tickets and in liquors. These enactments, so long as they stand unrepealed and un-

[1] License Tax Cases, 5 Wall. 462; Powell v. Pennsylvania, 127 U. S. 678, 685; 8 S. Ct. 992, 1257; Sharpless v. Mayor, 21 Pa. St. 147, 159; 59 Am. D. 759; Hedderich v. State, 101 Ind. 564; 51 Am. R. 768; Mayor &c. v. Yuille, 3 Ala. 137; 36 Am. Dec. 441; Dorman v. State, 34 Ala. 216, 235; Boehm v. Hertz, 182 Ill. 154; 54 N. E. 973; Tarbell v. Rutland R. Co., 73 Vt. 347; 51 Atl. 6; 56 L. R. A. 656 (1901).

modified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy is therefore a contradiction in terms, or it is intended as a denial of their expediency or their propriety. If intended in the latter sense, the proposition is one of which the courts can not take cognizance."

In The City of Norwich,[1] in which it was held that insurance is no part of a shipowner's interest in the ship or freight within the meaning of the Limited Liability Act of 1851,[2] the court says by Mr. Justice Bradley: "The truth is, that the whole question, after all, comes back to this: Whether a limited liability of shipowners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question."

§ 10. Free pass with agreement to hold harmless.— Some close cases have arisen upon the question of a railroad's liability for negligence causing injury to an express-messenger or postal-clerk or cattle-drover or other person in the employ of a third person, riding free upon the cars of the railroad under a contract exempting the railroad company from liability for negligence.

The prevailing rule seems to be that a contract between the railroad and the plaintiff's employer exempting the railroad company from liability to such a plaintiff is valid and binding upon the plaintiff at common law, at least if he assents to it, or if it is brought home to his knowledge and he obtains the benefit of his appointment to his position in consideration thereof. Such a contract is not contrary to public policy, because the plaintiff is not a passenger, and the railroad is not under any legal obligation to carry such persons upon their trains; it is a mere privilege granted to the plaintiff and his employer, and

[1] 118 U. S. 468, 495; 6 S. Ct. 1150.
[2] U. S. Rev. Stats., §§ 4282–4287.

the rights growing out of the privilege may be limited by contract between the parties.[1]

In Russell v. Pittsburgh &c. R. Co. (Ind.),[2] the plaintiff was employed by the Pullman Sleeping Car Company as a porter, and while he was upon the train of the defendant railway company, in the discharge of his duties, was injured by reason of the negligence of the defendant's employees. It appeared that the plaintiff had agreed in writing with the Pullman Company to assume all risks of accident incident to such service, and that the Pullman Company had agreed with the defendant railroad company to hold it harmless for all injuries to the Pullman Company's employees. The action was at common law, and the court held that the agreement was not contrary to public policy and relieved the defendant railroad company from liability to the plaintiff. Judge Dowling in delivering the court's opinion says: "The appellant [Russell] did not occupy the position of an ordinary passenger upon appellee's train. He was not being carried upon any journey from one point to another, nor was his presence incidental to the shipment of goods which the carrier was bound to accept. He occupied the sleeping-car as a part of his employment with the Pullman Company. In no sense was the appellee bound to accept the appellant upon

[1] Baltimore &c. R. Co. v. Voigt, 176 U. S. 498; 20 S. Ct. 385; Bates v. Old Colony R. Co., 147 Mass. 255; 17 N. E. 633; Hosmer v. Old Colony R. Co., 156 Mass. 506; 31 N. E. 652; Robertson v. Old Colony R. Co., 156 Mass. 525; 32 Am. St. 482; 31 N. E. 650; Louisville &c. R. Co. v. Keefer, 146 Ind. 21; 38 L. R. A. 93; 44 N. E. 796; 58 Am. St. 348 (1896); Pittsburgh &c. R. Co. v. Mahoney, 148 Ind. 196; 62 Am. St. 503; 40 L. R. A. 101; 46 N. E. 917; 47 N. E. 464 (1897); Bissell v. New York Central R. Co., 25 N. Y. 442; 82 Am. D. 369; Poucher v. New York Central R. Co., 49 N. Y. 263; 10 Am. R. 364; Griswold v. New York &c. R. Co., 53 Conn. 371; 4 Atl. 261; 55 Am. R. 115; Coup v. Wabash &c. R. Co., 56 Mich. 111; 22 N. W. 215; 56 Am. R. 374; Blank v. Illinois Central R. Co., 182 Ill. 332; 55 N. E. 332; Foreman v. Pennsylvania R. Co., 195 Pa. St. 499; 46 Atl. 109 (1900).

[2] 157 Ind. 305; 61 N. E. 678.

agreements were contracts of release within the meaning of the act, and that consequently the acceptance of benefits under the agreement after the injury did not operate to discharge or release the employer from further liability.[1] This decision has, however, been overruled, on the ground that the contract forbidden by the statute is one relieving the company from liability for the future negligence of itself and employees, while a relief-fund agreement recognizes a liability for such negligence, and only stipulates that, if the injured employee shall prosecute a suit against his employer to final judgment, he shall thereby forfeit his right to the relief fund, and if he accepts compensation from the relief fund, he shall forfeit his right of action against the employer. "It is nothing more or less," remarks Mr. Justice Hadley, "than a contract for a choice between sources of compensation, where but a single one existed, and it is the final choice—the acceptance of one against the other—that gives validity to the transaction."[2]

But in Indiana, when the injury to the employee results in death, it has been decided that the acceptance of benefits under such a "relief fund" agreement by the beneficiary is not a bar to a recovery of damages for the death by the administrator for the use of the child of the deceased. The reason assigned is that the statute for death by wrongful act creates a new and independent right of action, and does not confer on the personal representative of the deceased the same right or cause of action which would have vested in the deceased in his lifetime.[3]

[1] Pittsburgh &c. R. Co. v. Montgomery, 152 Ind. 1; 71 Am. St. 301; 49 N. E. 582 (1898).

[2] Pittsburgh &c. R. Co. v. Moore, 152 Ind. 345, 356; 53 N. E. 290 (1899); Pittsburgh &c. R. Co. v. Elwood, 25 Ind. App. 671; 58 N. E. 866 (1900).

[3] Pittsburgh &c. R. Co. v. Hosea, 152 Ind. 412; 53 N. E. 419 (1899); Cowen v. Ray, 108 Fed. 320 (1901).

When the "relief fund" agreement provides that it shall be governed by the law of one state and the negligent act causing the employee's death occurs in another state, the administrator's right of action is governed by the law of the latter state, at least when the statute of the state of injury differentiates the right of the administrator from the interest of the beneficiary. In such case the acceptance of benefits by the beneficiary will not bar an action by the administrator in the state of injury (Indiana), although it would bar such an action in the state of contract (Maryland).[1]

In Pittsburg &c. R. Co. v. Cox (Ohio),[2] Cox, while in defendant's employ, was injured and accepted the benefit arising from a voluntary relief fund. It was held that this acceptance of benefits after his injury and with full knowledge of all the facts, was an election by him which prevented a subsequent action against the company; that after his injury he could either sue the company or accept money from the relief fund; that such a contract was not void as against public policy; and that "a controlling distinction between Railway Co. v. Spangler (Ohio)[3] and this case, is that in that case the party bargained away his right to an action in advance, while in this case he retains whatever right of action he may have until after knowledge of all the facts." (Per Spear, J., for the court, p. 644.) It was further held, that the result was not altered by a state statute of Ohio prohibiting railroad companies from making contracts with their employees exempting the company from liability for negligence, causing injury to employees.

That the railroad company has no power under its charter to insure its employees, or to enter into "relief

[1] Cowen v. Ray, 108 Fed. 320 (1901).
[2] 55 Ohio St. 497; 45 N. E. 641; 35 L. R. A. 507 (1896).
[3] 44 Ohio St. 471; 8 N. E. 467.

fund agreements with them, does not invalidate the defense based upon such an agreement when the employee has accepted the benefits from the relief department. Ultra vires can not be shown in this case, because the contract is neither immoral nor forbidden by statute, and has been fully performed in good faith by the corporation, and the employee has received the full benefit of the contract.[1]

But a contract by a railroad company and its employee through the "relief department," by which the decision of the advisory committee is made final and conclusive, is void, and does not prevent a suit at law, as "the right to appeal to the courts for the redress of wrongs is one of those rights which is, in its nature, under our constitution, inalienable, and can not be thrown off or bargained away."[2]

Even if the employee is a minor, such a contract is binding upon him if it entitles him to receive the benefits of the relief fund, both where the employer is and is not liable at law for the injury. It is considered to be to the minor's advantage, and he can not recover damages of the employer either at common law or under the Employers' Liability Act of England.

[1] Eckman v. Chicago &c. R. Co., 169 Ill. 312; 38 L. R. A. 750; 48 N. E. 673 (1897).

[2] Baltimore &c. R. Co. v. Stankard, 56 Ohio St. 224; 46 N. E. 577; 60 Am. St. 745; citing Supreme Council &c. v. Forsinger, 125 Ind. 52; 25 N. E. 129; 9 L. R. A. 501; 21 Am. St. 196; Whitney v. National Masonic Accident Ass'n, 52 Minn. 378; 54 N. W. 184; Insurance Co. v. Morse, 20 Wall. 445; Stephenson v. Piscataqua &c. Ins. Co., 54 Me. 55; Mentz v. Armenia &c. Ins. Co., 79 Pa. St. 478; 21 Am. R. 80; Reed v. Washington &c. Ins. Co., 138 Mass. 572.

[3] Clements v. London &c. R. Co., (1894) 2 Q. B. 482. In Flower v. London &c. R. Co., (1894) 2 Q. B. 65, a contract between a boy of thirteen years of age and the defendant railroad, whereby the road agreed to let him travel on the line at special rates, and he exempted it of liability for negligence, was held not binding on the minor, because it was to his detriment.

§ 13. Relation of employer and employee must exist.—To maintain an action under the Employers' Liability Act the person injured must have been in the employ of the defendant at the time of the injury,[1] and must also have been doing the work of the defendant, and not that of some one else, at that time.[2] The statutes of Massachusetts and of Colorado contain a qualification of this rule, however, and render the employer of an independent contractor liable in certain cases to the employees of such contractor.[3]

In Tennessee Coal &c. Co. v. Hayes (Ala.),[4] the plaintiff's father was employed by the defendant railroad to load its coal-cars at a certain price per car. The plaintiff was a minor, and was working under a request of the defendant's superintendent made to his father to assist the latter. The plaintiff's name was not on the defendant's pay-roll, and his father received his pay. It was held that the plaintiff was an employee of the defendant within the meaning of the Employers' Liability Act, and was entitled to its benefit.

§ 14. General or special employee.—"It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service so as to become as to that service the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired."[5]

[1] Dane v. Cochrane Chemical Co., 164 Mass. 453; 41 N. E. 678; Georgia Pac. R. v. Propst, 85 Ala. 203; 4 So. 711.

[2] Dean v. East Tennessee &c. R. Co., 98 Ala. 586; 13 So. 489.

[3] Toomey v. Donovan, 158 Mass. 232; 33 N. E. 396; post, §§ 93, 94.

[4] 97 Ala. 201; 12 So. 98.

[5] Per Mr. Justice Morton for the court in Coughlan v. City of Cambridge, 166 Mass. 268, 277; 44 N. E. 218; citing Johnson v. City of Boston, 118 Mass. 114; Ward v. New England Fibre Co., 154 Mass. 419; 28

In Coughlan v. City of Cambridge, just cited, the plaintiff was in the general employ of the Fitchburg Railroad Company and was hired with other employees to the city of Cambridge for the performance of certain work. While engaged in his duties the plaintiff was injured by reason of the negligence of the conductor and other employees having charge or control of a train which was transporting gravel to be used by the defendant city. The plaintiff brought this action under the Employers' Liability Act of Massachusetts. One defense was that the plaintiff and the conductor, and those in charge of the train, were not employees of the defendant, but of the Fitchburg Railroad. By the contract between the city and the railroad company the latter agreed to furnish for the use of the city a locomotive and twenty dump-cars, to keep the locomotive and cars in repair, to furnish fuel and supplies necessary for the same, to lay about one mile of track, to furnish rails, ties, and other materials, and to remove the track when the work was completed. The defendant agreed on its part to pay the Fitchburg Railroad the sum of $400 a mile for the use of the track, 35 cents apiece for the ties, and $37 per day during the continuance of the work, and to assume all risk of injury to any of the trainmen. The railroad company gave no directions in regard to the work, and exercised no control over the running of the train except so far as the conductor's oversight constituted such control. The conductor's duty was to have the train ready for the use of the defendant, and he took orders as to the trips to be made from the defendant's foreman. It was held that the plaintiff and the conductor and the other men employed on the train were the employees of the defendant within the meaning of the Employers' Liability Act, and that the plaintiff was entitled to the benefit of this statute.

N. E. 299; Hasty v. Sears, 157 Mass. 123; 31 N. E. 759; 34 Am. St. 267; Rourke v. White Moss Colliery Co., 2 C. P. D. 205.

Other cases discussing the question of injuries suffered by persons claiming or charged to be in the temporary employ of the defendant while in the permanent employ of a third person are cited in the foot-note.[1]

In Wild v. Waygood,[2] the plaintiff was in the general employ of a builder who was engaged in erecting a house. The defendant contracted with this builder to construct a lift in the house, and sent a joiner named Duplea to do the work. Duplea requested the builder's foreman to lend him a man to assist him, and the foreman sent the plaintiff for that purpose. There was some evidence that the defendant agreed to pay the plaintiff's wages while he was so engaged. Upon the third day of his employment, the plaintiff was injured through the negligence of Duplea. It was held that this evidence would warrant a finding that the relation of employer and employee existed between the parties, and that the defendant was liable under the English act of 1880.

The general servant of one master may become the special servant of another master for the time being. In such case the special servant becomes a fellow servant with the general servants of the latter master, so as to exempt him from liability to his special servant for the negligence of his general servants. Thus, if A lends his servant to B for a particular piece of work, and the servant is injured by the negligence of B's general servants, he can not recover of B because they are considered fellow servants.[3] But in order to relieve the new master in such case, it must appear that the servant knew that he had ceased to be under the control of the master employ-

[1] McInerney v. President &c., 151 N. Y. 411; 45 N. E. 848; Cunningham v. Syracuse Improvement Co., 46 N. Y. Supp. 954; 20 App. Div. (N. Y.) 171; Rourke v. White Moss Colliery Co., 2 C. P. D. 205; Wood v. Locke, 147 Mass. 604; 18 N. E. 578.

[2] (1892) 1 Q. B. 783.

[3] Hasty v. Sears, 157 Mass. 123; 31 N. E. 759.

ing him, and had passed under the control of the new master. In Morgan v. Smith (Mass.),[1] the following extract from the opinion of Lord Watson in Johnson v. Lindsay[2] is quoted with approval as correctly stating the rule and its limitations:

"I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become pro hac vice B's servant, in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned, by his fault, to B's own workmen. In order to produce that result, the circumstances must, in my opinion, be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment."[3]

In Olive v. Whitney Marble Co. (N. Y.)[4] a boilermaker was killed by the explosion of a boiler which he had been sent to repair. The boiler belonged to the defendant, and the plaintiff claimed that the accident was caused by the negligence of one Newcomb, the defendant's engineer, in putting fires under the boiler before the repairs were entirely finished. Newcomb either volunteered to aid the boilermakers, or was requested by them to aid in making the tests. It was held that in either event Newcomb in what he did was not acting as

[1] 159 Mass. 570, 571; 35 N. E. 101.

[2] (1891) A. C. 371.

[3] See also, Philadelphia &c. R. Co. v. State, 58 Md. 372; Svenson v. Atlantic Mail &c. Co., 57 N. Y. 108; Phillips v. Chicago &c. R. Co., 64 Wis. 475; 25 N. W. 544; Sawyer v. Rutland &c. R. Co., 27 Vt. 370; Cameron v. Nystrom, (1893) A. C. 308.

[4] 103 N. Y. 292; 8 N. E. 552.

the servant of the defendant, and that therefore the defendant was not responsible for his acts.

§ 15. Volunteer—Employee acting outside the scope of his employment.—The employer's duty toward an employee who voluntarily undertakes to do work other than that which he was hired to do is considerably lower than his duty toward the same employee while performing work within the terms of his contract of employment. The employer's liability is greater in the latter case than in the former, and the injured employee may often recover in the latter case when he could not recover in the former case.

If the employee's injury is received while doing more hazardous work than that for which he was hired, and is self-assumed, or done by way of accommodation without due authority from the employer, there can be, generally speaking, no recovery, either under the Employers' Liability Act or at common law.[1]

The performance of a single casual service by the plaintiff, at the request of the defendant's conductor, does not create the relation of employer and employee between the parties. In Georgia Pacific R. Co. v. Propst (Ala.),[2] a night-watchman was requested by the conductor of a freight-train to make a coupling, and, while attempting to do so, was injured. On a former appeal of this case it was held that in case of emergency the conductor had implied authority to hire brakemen,[3] and the plaintiff contended that the conductor's request to couple the cars constituted a contract of employment which was binding

[1] Georgia Pac. R. Co. v. Propst, 85 Ala. 203; 4 So. 711 (1888); Southern R. Co. v. Guyton, 122 Ala. 231; 25 So. 34 (1899); Mellor v. Merchants' Mfg. Co., 150 Mass. 362; 23 N. E. 100.

[2] 85 Ala. 203; 4 So. 711.

[3] Georgia Pac. R. Co. v. Propst, 83 Ala. 518; 3 So. 764. See also, Marks v. Rochester R. Co., 146 N. Y. 181; 40 N. E. 782 (1895).

upon the defendant. But the court held that "more is essential than a mere order or request to couple cars at one time and place, or doing a single act, to constitute an employment within the scope of the implied authority of the conductor. It must be to render service to some extent continuous in its nature."[1] It was accordingly decided that the plaintiff could not recover under the statute.

In Sloan v. Central Iowa R. Co. (Iowa)[2] it was held in an action brought by a brakeman under the fellow-servant act of Iowa that when the regular brakeman is absent the conductor has authority to employ a brakeman for the time being, and that the brakeman thereby becomes an employee of the railroad and entitled to the benefit of the act.

As to when the relation of employer and employee does or does not exist, see, also, the cases cited below.[3]

§ 16. Compulsory employee.—In order to sustain an action under the Employers' Liability Act, it is necessary not only that the injured employee should be in the service of the defendant but also that the negligent employee

[1] Per Clopton, J., for the court, p. 207.

[2] 62 Iowa 728; 16 N. W. 331 (1883).

[3] Shea v. Gurney, 163 Mass. 184; 39 N. E. 996; 47 Am. St. 446; Morgan v. Sears, 159 Mass. 570; 35 N. E. 101; Regan v. Casey, 160 Mass. 374; 36 N. E. 58; 30 Am. R. 645; Huff v. Ford, 126 Mass. 24; Forsyth v. Hooper, 11 Allen (Mass.) 419; Johnson v. City of Boston, 118 Mass. 114; Kimball v. Cushman, 103 Mass. 194; 4 Am. R. 528; Ward v. New England Fibre Co., 154 Mass. 419; 28 N. E. 299; Corbin v. American Mills, 27 Conn. 274; 71 Am. D. 63; Hexamer v. Webb, 101 N. Y. 377; 4 N. E. 755; 54 Am. R. 703; McCafferty v. Spuyten-Duyvil &c. R. Co., 61 N. Y. 178; 19 Am. R. 267; Speed v. Atlantic &c. R. Co., 71 Mo. 303; Schwartz v. Gilmore, 45 Ill. 455; 92 Am. D. 227; City of Cincinnati v. Stone, 5 Ohio St. 38; Railroad Co. v. Hanning, 15 Wall. 649; Water Co. v. Ware, 16 Wall. 566; Philadelphia &c. R. Co. v. State, 58 Md. 372; Phillips v. Chicago &c. R. Co., 64 Wis. 475; 25 N. W. 544; Cameron v. Nystrom, (1893) A. C. 308.

should be voluntarily employed by the defendant. If the defendant is compelled by law to employ the negligent employee, or a member of a class to which such negligent employee belongs, he is not liable for injuries caused by such negligence.[1]

A state statute requiring owners and operators of coal mines to have the mines inspected by state inspectors for the protection of the coal-miners, and to pay certain reasonable fees for the inspection, is a legitimate exercise of the police power, and does not contravene the constitution.[2]

But it seems that a statute which undertakes to render an employer liable for the negligence of a compulsory employee is unconstitutional and void.[3]

§ 17. Employee or independent contractor.—It is sometimes difficult to decide whether the plaintiff or other person in question is an employee of the defendant or an independent contractor. In Drennen v. Smith (Ala.),[4] the plaintiff was a boy eighteen years old, who lived with his father and worked in the defendant's coal mine under a contract made by his father, by which he was to mine coal at 42½ cents per ton, his father furnishing "the tools and powder and stuff," and the defendant's bank boss having control of the work. The plaintiff and his brother worked in a room with one Moore, an expert miner, and Moore received pay for one-half of the coal mined in this room, and the plaintiff and his brother re-

[1] Homer Ramsdell Trans. Co. v. La Compagnie Generale Transatlantique, 182 U. S. 406; 21 S. Ct. 831 (1901); Carruthers v. Sydebotham, 4 M. & S. 77; Attorney-General v. Case, 3 Price 302; Howells v. Landore &c. Co., L. R. 10 Q. B. 62 (1874). As to when an employee is or is not a compulsory employee, see Yates v. Brown, 8 Pick. (Mass.) 23 (1829); Denison v. Seymour, 9 Wend. (N. Y.) 10 (1832); Williamson v. Price, 4 Mart. N. S. (La.) 399 (1826).

[2] Chicago &c. Coal Co. v. People, 181 Ill. 270; 54 N. E. 961 (1899); Consolidated Coal Co. v. People, 186 Ill. 134; 57 N. E. 880 (1900).

[3] See Frazier v. New York &c. R. Co., 180 Mass. 427; 62 N. E. 731 (1902).

[4] 115 Ala. 396; 22 So. 442.

ceived pay for the other half. It was held that the plaintiff was not an independent contractor, but was an employee of the defendant within the terms of the Employers' Liability Act.

The mere fact that the defendant retains the right to decide how work shall be done on his premises, in his agreement with another person who hires and pays the plaintiff to do the work, does not show that the relation of employee and employer exists between the plaintiff and the defendant. In Dane v. Cochrane Chemical Co. (Mass.),[1] the plaintiff was injured through the negligence of one Johnson, and he alleged that Johnson was in the employ of the defendant as superintendent. The defense was that Johnson was not in the defendant's employ, but was an independent contractor, who had hired the plaintiff, and that the relation of employee and employer did not exist between the plaintiff and the defendant.[2]

The testimony showed that Johnson was employed by the defendant under a continuing contract to do carpentry-work which became necessary from time to time. He hired the men to do this work, among others the plaintiff; and he superintended, paid, and discharged them. The defendant paid Johnson $2.50 a day for his work, and 25 cents a day for each man employed by Johnson in addition to the amount which Johnson agreed to pay the men. Johnson furnished the tools and the defendant the material required for the work. The account between Johnson and the defendant was usually settled monthly, and Johnson paid his workmen every Saturday. Their names were not on the defendant's pay-roll, nor were they ever paid by the defendant. There was testimony which would justify the jury in finding that the defendant determined what repairs and alterations requiring carpentry-work should be made, and when and how they should be

[1] 164 Mass. 453; 41 N. E. 678.

[2] See also, Eldred v. Mackie, 178 Mass. 1; 59 N. E. 673 (1901).

made, although, when it decided upon what repairs and alterations were to be made, it usually left the manner of making them to the discretion of Johnson. It did not appear that Johnson was authorized to hire workmen on account of the defendant, or that the workmen hired by him ever understood that they were to be paid by the defendant, or that the defendant or Johnson so understood the matter. It was held in an action under the Employers' Liability Act that the evidence would not warrant the jury in finding that the plaintiff was in the employ of the defendant, and that the defendant was not liable. The test which seems to have controlled the court in reaching this conclusion is thus stated by Mr. Chief Justice Field, on pages 456, 457: "Could the plaintiff have recovered his wages of the defendant if they had not been paid by Johnson? Did Johnson hire the plaintiff on his own account, or as agent for the defendant? * * * The fact that the defendant retained the right to decide how work should be done on its premises does not of itself make the workmen employed by Johnson employees of the defendant. Apparently Johnson employed whom he pleased, and directed the men employed by him in the performance of their work, whether upon the premises of the defendant or upon other premises where he might be doing work. On the evidence we do not think that the jury could properly find that the relation of employee and employer existed between the parties."

In Staldter v. City of Huntington (Ind.)[1] it was held that a city is not liable for personal injuries to the employee of a contractor who has undertaken to construct a sewer along certain streets of the city, where the city retains no control over the work, except to see that it con-

[1] 153 Ind. 354; 55 N. E. 88 (1899).

forms to a particular standard prescribed by the plans and specifications of the contract.[1]

As to whether the person whose negligence causes the plaintiff's injury was in the defendant's employ or in the employ of an independent contractor at the time of the accident, see further the cases cited in the note.[2]

§ 18. Employee or passenger of defendant—Injury sustained while off duty—Fellow-servant rule.—An employee, while off duty, does not assume the risk of injury arising from the negligence of co-employees who are on duty and doing work for their common employer. They are not fellow servants within the meaning of the rule which renders the common employer not liable for such an accident.

A motorman, for instance, in the employ of a street-railway company, while going home to dinner after his morning's work, is not a fellow servant with the motorman of the car on which he is riding home, but is a passenger, though riding gratuitously, and if injured by reason of the negligence of the motorman operating the car, he can recover from his employer.[3]

Whether the relation between the plaintiff and defendant, who carried the plaintiff free because he works for

[1] See also, Vincennes Water Co. v. White, 124 Ind. 376; 24 N. E. 747; Wabash &c. R. Co. v. Farver, 111 Ind. 195; 12 N. E. 296; Clark v. Fry, 8 Ohio St. 358; 72 Am. D. 590.

[2] Atlantic Transport Co. v. Coneys, 82 Fed. 177; 28 C. C. A. 388 (1897); Linnehan v. Rollins, 137 Mass. 123; 50 Am. R. 287 (1884); Boomer v. Wilbur, 176 Mass. 482; 57 N. E. 1004 (1900); Hilliard v. Richardson, 3 Gray (Mass.) 349 (1855); Inhabitants &c. v. Rockport Granite Co., 177 Mass. 246; 58 N. E. 1017 (1901); Casement v. Brown, 148 U. S. 615; 13 S. Ct. 672 (1893); Butler v. Townsend, 126 N. Y. 105; 26 N. E. 1017 (1891); Hexamer v. Webb, 101 N. Y. 377; 4 N. E. 755; 54 Am. R. 703 (1886); Charlock v. Freel, 125 N. Y. 357; 26 N. E. 262 (1891); Vogel v. Mayor &c., 92 N. Y. 18; 44 Am. R. 349 (1883); Howard v. Ludwig, 171 N. Y. —; 64 N. E. 172 (1902).

[3] Dickinson v. West End St. R. Co., 177 Mass. 365; 59 N. E. 60.

the defendant, is that of employee and employer, or that of passenger and carrier, seems to depend upon whether the carriage is connected with the work which the plaintiff is performing for the defendant or not. If it is connected with such work, the relation is generally held to be that of employee and employer;[1] but if, at the time of the accident, the transportation is not connected with such work, and is merely for the plaintiff's convenience, business, or pleasure, he is a passenger and not an employee.[2]

In Bowles v. Indiana R. Co. (Ind.),[3] the defendant was constructing a trolley-line, and furnished a pair of horses and wagon to carry its workmen back and forth, free of charge and without any agreement for release of liability. While riding in this wagon on his way to work, the plaintiff was injured by the horses running away. It was held that the relation between the parties was that of employee and employer at the time of the accident, and was not that of passenger and carrier.

In Doyle v. Fitchburg R. Co. (Mass.),[4] the plaintiff's intestate lived upon the line of the railroad company and held a ticket entitling him to ride from one place to another on the line of the railroad either for business or on pleasure. The rate of wages paid to him was the same as that paid for the same class of work to other employees

[1] Bowles v. Indiana R. Co., 27 Ind. App. 672; 62 N. E. 94 (1901); Gormley v. Ohio &c. R., 72 Ind. 31 (1880); McGuirk v. Shattuck, 160 Mass. 45 (1893); Gillshannon v. Stony Brook R., 10 Cush. (Mass.) 228 (1852); Abend v. Terre Haute &c. R. Co., 111 Ill. 202 (1884); Vick v. New York Central &c. R. Co., 95 N. Y. 267 (1884); Russell v. Hudson River R. Co., 17 N. Y. 134 (1858); Ryan v. Railroad Co., 23 Pa. St. 384.

[2] Dickinson v. West End St. R. Co., 177 Mass. 365; 59 N. E. 60 (1901); Doyle v. Fitchburg R. Co., 162 Mass. 66; 37 N. E. 770 (1894); Pendergast v. Union R. Co., 41 N. Y. Supp. 927 (1896); McNulty v. Pennsylvania R. Co., 182 Pa. St. 479; 38 Atl. 524 (1897); O'Donnell v. Railroad Co., 59 Pa. St. 239; State v. Western Maryland R. Co., 63 Md. 433 (1884).

[3] 27 Ind. App. 672; 62 N. E. 94 (1901).

[4] 166 Mass. 492; 44 N. E. 611; 33 L. R. A. 844; 55 Am. St. 417.

who were not furnished with such ticket. It was held that the ticket formed part of the consideration by which he was induced to enter and continue in the employ of the defendant, and that it was not a mere gratuity, and that therefore the company could not exempt itself from liability for negligence causing his death. If the ticket had been a gratuity the contract on the back of it would have precluded a recovery.[1]

A workman, while eating his lunch in a boiler-house maintained by his employer, is still in the employment, and is not a mere licensee, though he is paid by the hour while he works, and was not working at the time of his injury.[2]

The fact that an employer claims an exemption from liability must be brought home to the injured employee before the accident, in order to avail as a defense.

In Pendergast v. Union R. Co. (N. Y.),[3] the plaintiff's husband was killed while riding on a free pass over the line of the defendant railway company. He had been in the employ of the defendant for some time before the accident, and had been accustomed to receiving free passes. The defendant's foreman testified that he had at previous times, when giving the deceased passes, notified him that "he had to ride at his own risk, and that the company was entirely blameless." There was no evidence that the deceased was so notified when he received the pass in question. It was held that the pass did not exempt the defendant from liability.

An employee off duty, and riding free with the permission of his employer, a railroad company, must not vol-

[1] Quimby v. Boston &c. R. Co., 150 Mass. 365; 23 N. E. 205; 5 L. R. A. 846; Rogers v. Kennebec Steamboat Co., 86 Me. 261; 29 Atl. 1069; Griswold v. New York &c. R. Co., 53 Conn. 371; 4 Atl. 261; 55 Am. R. 115.

[2] Heldmaier v. Cobbs, 195 Ill. 172; 62 N. E. 853 (1902).

[3] 41 N. Y. Supp. 927; 10 App. Div. (N. Y.) 207 (1896).

untarily place himself in an unsuitable position for a passenger to occupy; if he does so he loses the protection which a passenger enjoys, and the railroad company owes him no duty except to avoid wilful injury. In a recent Indiana case it was accordingly held that a section-hand who took a position on the front platform of a freight-car, and was thrown off by the car passing over a defect in the track, was guilty of contributory negligence and could not recover.[1]

If a railroad engineer agrees not to go into saloons or drink whisky while in the "employ" of a railroad company, the word "employ" covers the time between trips or runs, as well as the time he is actually on duty.[2]

In some cases the dispute has been as to whether the plaintiff had ceased to be in the defendant's employ at the time of the accident—it being admitted that he had been in the defendant's employ at one time.[3]

§ 19. "As if the employee had not been in the service of the employer."—The Massachusetts and New York acts provide that in certain specified cases an employee shall have the same right of compensation and remedies against his employer "as if the employee had not been an employee of, nor in the service of the employer, nor engaged in its work."[4] "In other words, in the cases specified the defense of common employment with the person through whose negligence the injury was caused is taken away."[5]

[1] Coyle v. Pittsburg &c. R. Co., 155 Ind. 429; 58 N. E. 545 (1900). See also, Udell v. Citizens' St. R. Co., 152 Ind. 507; 71 Am. St. 336; 52 N. E. 799; Hickey v. Boston &c. R. Co., 14 Allen (Mass.) 429; Camden &c. R. Co. v. Hoosey, 99 Pa. St. 492; 44 Am. R. 120.

[2] Kansas City &c. R. Co. v. Phillips, 98 Ala. 159; 13 So. 65 (1893).

[3] Packet Co. v. McCue, 17 Wall. 508.

[4] Mass. St. 1887, ch. 270, § 1, cl. 3; Rev. Laws 1902, ch. 106, § 71, cl. 3; N. Y. acts of 1902, ch. 600, § 1, cl. 2.

[5] Coffee v. New York &c. R. Co., 155 Mass. 21, 22; 28 N. E. 1128, per Allen, J., for the court.

The Alabama act of 1885 declares that the employer is liable to the employee "as if he were a stranger, and not engaged in such service or employment." In construing this clause, the supreme court of Alabama has said:

"The expression, 'as if he were a stranger,' is inapt, and, literally interpreted, would put the employee in the position of a trespasser, or mere licensee; but it is apparent that such is not the intention, shown by the succeeding words, 'and not engaged in such service or employment.' The purpose of the statute is to protect the employee against the special defenses growing out of, and incidental to, the relation of employer and employee; and the result is to take from the employer such special defenses, but to leave him all the defenses which he has by the common law against one of the public, not a trespasser nor a bare licensee."[1]

In Thomas v. Quartermaine,[2] Fry, L. J., says: "If the workman is to have the same rights as if he were not a workman, whose rights is he to have? Who are we to suppose him to be? I think that we ought to consider him to be a member of the public entering on the defendant's property by his invitation." In the same case Bowen, L. J., says on pages 693, 694: "The true view, in my opinion, is that the act, with certain exceptions, has placed the workman in a position as advantageous as, but no better than, that of the rest of the world who use the master's premises at his invitation on business. If it has created any further or other duty to be fulfilled by the master, I do not know what it is, how it is to be defined, or who is to define it."

§ 20. Actions against municipal corporations. — The Massachusetts and Alabama acts apply to cities and

[1] Mobile &c. R. Co. v. Holborn, 84 Ala. 133, 136; 4 So. 146, per Clopton, J.

[2] 18 Q. B. D. 685, 700.

towns, and give a right of action against them to their employees in certain cases, as for negligence in digging a trench.[1]

The statute, however, merely gives the employee "the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work." His rights are no greater than those of a traveler on a public highway within the limits of the city or town. When the act complained of is the neglect of a public duty imposed upon the city or town by law for the benefit of the public, and from the performance of which it receives no profit or advantage, it is not liable in damages for a personal injury received either by a traveler[2] or by an employee. Hence, where a lineman employed on the fire-signal system of a city was injured by the breaking of a pole to which the wires were attached, it was held that the city was not liable under the Massachusetts act, though the breaking was due to the negligence of the city.[3] So, where a city employee is injured through the negligence of the superintendent or assistant superintendent of streets, it has been held in Massachusetts that the city is not liable under the Employers' Liability Act, because the negligence was that of a public officer, and

[1] Connolly v. City of Waltham, 156 Mass. 368; 31 N. E. 302; Conroy v. Inhabitants &c., 158 Mass. 318; 33 N. E. 525; Hennessy v. City of Boston, 161 Mass. 502; 37 N. E. 668; Coughlan v. City of Cambridge, 166 Mass. 268; 44 N. E. 218; Norton v. City of New Bedford, 166 Mass. 48; 43 N. E. 1034 (1896); City Council &c. v. Harris, 101 Ala. 564; 14 So. 357.

[2] Hafford v. City of New Bedford, 16 Gray (Mass.) 297; Fisher v. City of Boston, 104 Mass. 87; 6 Am. R. 196; Hill v. City of Boston, 122 Mass. 344; 23 Am. R. 332.

[3] Pettingell v. City of Chelsea, 161 Mass. 368; 37 N. E. 571; 24 L. R. A. 426.

the statute does not change the law of agency;[1] but the contrary has been decided in Alabama under its statute.[2]

So, likewise, where the plaintiff was injured by the fall of a derrick in the Boston subway, the work of constructing which was in charge of certain transit commissioners, over whom the city of Boston had no control, it was held that the city was not liable under the Employers' Liability Act, because the transit commissioners were public officers engaged in the performance of public duties, independent of the city of Boston.[3]

But where the duty is not imposed by law, but is voluntarily assumed by the city or town, and especially if it receives payment or part payment from the abutters for any special advantages, such as sewers, the duty performed is not a public duty within the meaning of the rule exempting the city or town from liability, and it will therefore be liable to an employee who is injured through its negligence or that of its officers.[4]

A town or city may be estopped to deny the legality of the appointment of a superintendent in an action against it by an employee under the Employers' Liability Act. If the person serves the city in the capacity of superintendent of the work in question, and the city authorities acquiesce in such service and take the benefit of his skill and labor, it will not be heard to deny the legality of his appointment, and it will be responsible for his acts done within the scope of the service. It can not appropriate the benefit and repudiate the burden.[5]

[1] McCann v. City of Waltham, 163 Mass. 344; 40 N. E. 20.

[2] City Council &c. v. Harris, 101 Ala. 564; 14 So. 357; Lewis v. City Council &c. (Ala.), 16 So. 34 (1894).

[3] Mahoney v. City of Boston, 171 Mass. 427; 50 N. E. 939 (1898).

[4] Coan v. City of Marlborough, 164 Mass. 206; 41 N. E. 238; Murphy v. City of Lowell, 124 Mass. 564; Child v. City of Boston, 4 Allen (Mass.) 41, 52; 81 Am. D. 680; Norton v. City of New Bedford, 166 Mass. 48; 43 N. E. 1034.

[5] City Council &c. v. Harris, 101 Ala. 564; 14 So. 357.

In an action under the Employers' Liability Act, for an injury sustained in sewer-trench digging, the city is estopped to claim that the sewer was not legally established or laid out, where it had the power to lay and construct sewers, and had allowed this sewer to be put in course of construction as a public sewer, under an appropriation of its money for that purpose, and had used the sewer as a part of its sewer system.[1] Irregularities in the laying out of the sewer could be taken advantage of by the city on a direct proceeding, but not in this collateral proceeding brought by an injured employee.

§ 21. Judgment and settlement by consent of next friend of minor employee.—Under the Alabama statute it has been held that the next friend of a minor employee can not compromise a suit brought on behalf of the minor for personal injuries, and that a judgment by consent of the next friend is not binding on the minor, and is no bar to another action for the same injury.[2]

In Massachusetts and New Hampshire the contrary rule prevails, that a judgment entered by consent of the next friend concludes the minor, and bars another action by him on the same cause of action,[3] although a settlement made out of court by the next friend, and not approved by the court, does not conclude the minor, and is not admissible against the minor either in bar or on the question of damages.[4] The method now generally practiced is to submit the agreement for judgment, signed by the parties, to the court for approval.

In New York under a statute providing that before any process shall be issued in the name of an infant who is sole plaintiff, a next friend or guardian shall be appointed,

[1] Norton v. City of New Bedford, 166 Mass. 48; 43 N. E. 1034. See also, Slocum v. Selectmen &c., 163 Mass. 23; 39 N. E. 351.

[2] Tennessee Coal &c. Co. v. Hayes, 97 Ala. 201; 12 So. 98.

[3] Beliveau v. Amoskeag Mfg. Co., 68 N. H. 225; 40 Atl. 734.

[4] Tripp v. Gifford, 155 Mass. 108; 29 N. E. 208; 31 Am. St. 530.

who shall be responsible for the costs of suit, it has been decided that the objection that no such person was appointed before the process issued, may be taken by motion before filing a plea,[1] and that after plea it is too late to move to set aside the proceedings on the ground that the suit is prosecuted without the appointment of a prochein ami.[2]

As to the power of a next friend to commence and to compromise a suit, see, also, the cases cited below.[3]

§ 22. Suits in federal courts under state statute.—Suits to enforce a right given by the Employers' Liability Act may be brought in the federal courts as well as in the state courts.[4] The fact that the right is unknown to the common law, and is created only by state statute, does not prevent the federal courts from trying the case. Even if the statute declares that the action shall be brought only in a state court, this does not oust the jurisdiction of the federal courts.[5] Nor is it necessary that the federal court selected for action should sit within the state whose statute confers the right of action. As the action is of a transitory nature, the right may be enforced in any circuit court of

[1] Wilder v. Ember, 12 Wend. (N. Y.) 191 (1834); Freyberg v. Pelerin, 24 How. Pr. (N. Y.) 202 (1862); Hill v. Thacter, 3 How. Pr. (N Y.) 407 (1848).

[2] Fellows v. Niver, 18 Wend. (N. Y.) 563 (1836).

[3] Clark v. Crout, 34 S. C. 417; 13 S. E. 602; Crotty v. Eagle, 35 W. Va. 143; 13 S. E. 59; Baltimore &c. R. Co. v. Fitzpatrick, 36 Md. 619; Kingsbury v. Buckner, 134 U. S. 650; 10 S. Ct. 638; Tucker v. Dabbs, 12 Heisk. (Tenn.) 18; Miles v. Kaigler, 10 Yerger (Tenn.) 10; 30 Am. D. 425; Smith v. Redus, 9 Ala. 99; 44 Am. D. 429; Isaacs v. Boyd, 5 Porter (Ala.) 388; Munn v. Reed, 4 Allen (Mass.) 431 (1862); Guild v. Cranston, 8 Cush. (Mass.) 506 (1851); Whitten v. State, 36 Ind. 196 (1871); Wilder v. Ember, 12 Wend. (N. Y.) 191 (1834) (holding that under a special statute of NewYork, a prochein ami must be appointed *before* the suing out of process); Elder v. Adams, 180 Mass. 303; 62 N. E. 373 (1902).

[4] Griffin v. Overman Wheel Co., 61 Fed. 568.

[5] Railway Co. v. Whitton, 13 Wall. 270; Bigelow v. Nickerson, 70 Fed. 113; affirming Nickerson v. Bigelow, 62 Fed. 900.

the United States having jurisdiction of the subject-matter and of the parties.[1]

In some cases the federal courts are more favorable to the plaintiff than the state courts. Thus, in those courts the burden is upon the defendant to prove that the plaintiff was not in the exercise of due care at the time of the injury,[2] while in the state courts of Massachusetts,[3] and some other states,[4] the burden is upon the plaintiff to show that he was in the exercise of due care at that time. Hence, when the plaintiff fears the defense of contributory negligence or want of due care, he is more likely to recover a verdict in the federal court than in any state court where this rule prevails.

But if the Employers' Liability Act, or other state statute sued upon, expressly provides that the employee must be "in the exercise of due care and diligence at the time" of the accident, the federal courts will adopt and follow the state statute, and will require the plaintiff to show affirmatively as an element of recovery that he was careful and free from contributory negligence. The Employers' Liability Acts of New York, of Massachusetts, of Colorado and of Indiana contain such a requirement, and the federal courts sitting in these states will, it seems, disregard their ordinary rule as to the burden of proof, and place this burden upon the plaintiff in actions under

[1] Dennick v. Railroad Co., 103 U. S. 11; Northern Pacific R. Co. v. Babcock, 154 U. S. 190; 14 S. Ct. 978.

[2] Railroad Co. v. Gladmon, 15 Wall. 401; Texas &c. R. Co. v. Volk, 151 U. S. 73, 77; 14 S. Ct. 239.

[3] Shea v. Boston &c. R. Co., 154 Mass. 31; 27 N. E. 672; Browne v. New York &c. R. Co., 158 Mass. 247; 33 N. E. 650; Murphy v. Deane, 101 Mass. 455; 3 Am. R. 390.

[4] Park v. O'Brien, 23 Conn. 339; Merrill v. Inhabitants &c., 26 Me. 234; Cordell v. New York &c. R. Co., 75 N. Y. 330; Dyer v. Talcott, 16 Ill. 300.

these statutes.[1] The Alabama Employers' Liability Act, however, contains no such provision.

Although the strictness of this rule has been relaxed somewhat in Massachusetts in the case of the killing of an employee, when all the circumstances attending the injury are in evidence and they fail to show any fault on the part of the deceased, still, that the federal rule is more advantageous for the plaintiff is shown by comparing the cases in the note.[2]

§ 23. Same—Adopt construction given to state statute by state court.—When an action for personal injuries is brought in a federal court sitting in the state where the injury was received and under its statute, the federal court is bound to follow the construction given to that statute by the highest state court. This is not a question of general law or jurisprudence, but merely of local law, and section 721 of the U. S. Revised Statutes applies to the case.[3]

Although a state statute relating to the liability of employers to their employees be merely declaratory of the common-law rule, yet the federal courts in deciding

[1] Overman Wheel Co. v. Griffin, 67 Fed. 659; 14 C. C. A. 609 (1895); Byrne v. Kansas City &c. R. Co., 61 Fed. 605; 9 C. C. A. 666 (1894). But see opinion of Webb, J., in Griffin v. Overman Wheel Co., 61 Fed. 568; 9 C. C. A. 542 (1894).

[2] Compare Griffin v. Overman Wheel Co., 61 Fed. 568; 9 C. C. A. 542 (1894), with Tyndal v. Old Colony R. Co., 156 Mass. 503; 31 N. E. 655; Irwin v. Alley, 158 Mass. 249; 33 N. E. 517; Chandler v. New York &c. R. Co., 159 Mass. 589; 35 N. E. 89; Felt v. Boston &c. R. Co., 161 Mass. 311; 37 N. E. 375.

[3] Bucher v. Cheshire R. Co., 125 U. S. 555; 8 S. Ct. 974; Detroit v. Osborne, 135 U. S. 492; 10 S. Ct. 1012; Chicago &c. R. Co. v. Stahley, 62 Fed. 363; 11 C. C. A. 88.

This statute provides that "the laws of the several states, except when the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 1 Stats. 92.

causes based upon or governed by the state statute are bound to adopt and follow the construction placed upon such statute by the highest state court.[1]

Even when the federal court sits in a state other than that of the injury, the construction given to a statute of the state of injury by its highest court is binding upon the federal courts. A brakeman was injured in North Dakota through the negligence of the conductor. Action was brought in a federal court sitting in Minnesota. Under a statute of North Dakota, as construed by its highest court, the common employer was not liable to the brakeman for the negligence of the conductor. The United States circuit court of appeals for the eighth circuit held that this construction was binding upon the federal court and prevented a recovery.[2]

When, however, the action is brought in a federal court sitting in a state other than that in which the injury was received, and under a statute of the state of injury, the federal court is not bound to follow the construction given to that statute by the courts of the state in which it sits, but may enforce the statute of such other state, although the local state courts have refused to enforce it.[3]

§ 24. Same—Enforcing statutes of other states.—In the matter of enforcing a right of action given by a statute of another state for a personal injury received there, the federal courts construe the statute more favorably to the plaintiff than do the state courts of Massachusetts and of some other states. The recognition of a statute of another state depends upon the principles of interstate comity, which principles have always been cherished by

[1] Northern Pac. R. Co. v. Hogan, 63 Fed. 102, 106; 11 C. C. A. 102; Griffin v. Overman Wheel Co., 61 Fed. 568; 9 C. C. A. 542.

[2] Northern Pac. R. Co. v. Hogan, 63 Fed. 102; 11 C. C. A. 102.

[3] Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 S. Ct. 905; post, § 24.

the federal courts,[1] and sometimes disregarded by the state courts. Thus, in Dennick v. Railroad Co.,[2] it was held that an administrator appointed in New York of a person killed in New Jersey through defendant's negligence could maintain an action in the federal court sitting in New York under a statute of New Jersey which made any person or corporation whose wrongful act, neglect or default should cause the death of any person, liable to an action by his administrator for the benefit of his widow and next of kin. In several state courts, however, like statutes of other states have been refused recognition and enforcement.[3]

Again, the question of whether a statute of another state shall be enforced is a question of general law or jurisprudence; and therefore the federal courts are not bound to follow the construction given to such statute by the courts of the state in which they sit. Hence a decision by a state court, that no action can be maintained under a statute of another state, is not binding upon a federal court sitting in the first state in another like case. In Texas &c. R. Co. v. Cox,[4] a freight-conductor in the employ of the railroad company was killed in Louisiana through the negligence of the company. His widow brought this action in the United States circuit court for Texas to recover damages under the Louisiana statute. Several decisions of the supreme court of Texas were cited,[5] tending to support the view that an action could not be

[1] Bank of Augusta v. Earle, 13 Peters 519.

[2] 103 U. S. 11.

[3] Richardson v. New York &c. R. Co., 98 Mass. 85; Woodard v. Michigan &c. R. Co., 10 Ohio St. 121; McCarthy v. Chicago &c. R. Co., 18 Kan. 46; 26 Am. R. 742; Taylor v. Pennsylvania R. Co., 78 Ky. 348; 39 Am. R. 244.

[4] 145 U. S. 593; 12 S. Ct. 905.

[5] Willis v. Missouri Pac. R. Co., 61 Tex. 432; 48 Am. R. 301; Texas &c. R. Co. v. Richards, 68 Tex. 375; 4 S. W. 627; St. Louis &c. R. Co. v. McCormick, 71 Tex. 660; 9 S. W. 540; 1 L. R. A. 804.

maintained in Texas on a statute of another state like that of Louisiana. But the supreme court of the United States refused to be bound by the Texas decisions upon the ground that the question was one of "general law" (page 605), and gave judgment for the plaintiff on the authority of Dennick v. Railroad Co.[1] In Huntington v. Attrill,[2] the Cox case was cited by the court in support of the proposition that, "If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions."[3]

§ 25. Federal courts are not bound by state decisions as to who are fellow servants, or some other questions of employers' liability at common law.—In the absence of state legislation, the question whether the engineer and fireman running a locomotive-engine without a train attached are fellow servants, so as to relieve the railroad company from liability to the fireman by reason of the engineer's negligence, is not a question of local law upon which the federal courts are bound to follow the state decisions, but is one of general law upon which the federal courts may exercise their independent judgment, uncontrolled by local decisions.[4] In delivering the court's opinion in the case cited below, Mr. Justice Brewer says, on page 378: "But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right

[1] 103 U. S. 11.

[2] 146 U. S. 657, 683; 13 S. Ct. 224.

[3] See also, Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 198; 14 S. Ct. 978.

[4] Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 S. Ct. 914.

and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the states is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our constitution."

So, the questions of the employer's duty to use reasonable care to provide proper tools and appliances, and a safe working-place, and the defense of contributory negligence, are questions of general law, and in the absence of statutory regulations by the state in which the cause of action arises the federal courts are not required to follow the decisions of the state courts as to whether or not there was sufficient evidence to warrant a verdict for the plaintiff upon these issues.[1]

§ 26. Suit in admiralty court for maritime tort.— Whether or not an admiralty court sitting within a state where an injury occurs will enforce a new right of action, given by an Employers' Liability Act of that state, has not been decided.

It has been held, however, that the admiralty courts will enforce a state statute giving a right of action for death by negligence. If the negligence is a maritime tort, the suit may be maintained either in rem or in personam.[2]

[1] Hough v. Texas &c. R. Co., 100 U. S. 213, 226; Gardner v. Michigan Central R. Co., 150 U. S. 349, 358; 14 S. Ct. 140.

[2] Holmes v. Oregon &c. R. Co., 5 Fed. 75; The Clatsop Chief, 8 Fed. 163; The E. B. Ward, Jr., 17 Fed. 456. Contra, as to suit in rem, The Vera Cruz, 10 App. Cas. 59.

If a state statute giving a right of action against a vessel in rem also creates a lien, the federal courts have held that such lien may be enforced in admiralty when the accident occurs in waters of the state navigable from the sea.[1]

When, however, the state statute does not create a lien the federal courts have held that the right of action for death can not be enforced by libel in rem.[2]

§ 27. Sunday work.—In New York, Indiana and most other states the fact that the plaintiff is injured on Sunday while doing work for the defendant and at his request is no defense, although the work is a violation of the Sunday law. The negligence of the defendant is the cause of the injury and not the violation of the penal statute. The injury to the plaintiff would have happened on any other day under similar conditions. The act of working is merely a condition and not a contributing cause of the accident. Having invited and requested a violation of the Sunday law, it does not lie in the defendant's mouth to plead it.[3]

"If the railway company violated its duty by furnishing machinery and appliances which it knew were defective," says Mr. Justice Mitchell, "the danger to an

[1] The Glendale v. Evich, 81 Fed. 633; 26 C. C. A. 500; The Oregon, 45 Fed. 62. See also, The Harrisburg, 119 U. S. 199; 7 S. Ct. 140; The Corsair, 145 U. S. 335; 12 S. Ct. 949.

[2] The Corsair, supra; The Sylvan Glen, 9 Fed. 335; The Manhassett, 18 Fed. 918; The Northcambria, 40 Fed. 655.

[3] Solarz v. Manhattan R. Co., 8 Misc. (N. Y.) 656; 11 Misc. (N. Y.) 715; 155 N. Y. 645; 49 N. E. 1104 (1898); Platz v. Cohoes, 89 N. Y. 219 (1882); Louisville &c. R. Co. v. Buck, 116 Ind. 566; 19 N. E. 453; 2 L. R. A. 52; 9 Am. St. 883 (1889); Louisville &c. R. Co. v. Frawley, 110 Ind. 18; 9 N. E. 594 (1887); Philadelphia &c. R. Co. v. Philadelphia &c. Co., 23 How. (U. S.) 209 (1860); Powhattan Steamboat Co. v. Appomattox R. Co., 24 How. (U. S.) 247 (1861); Railway Co. v. McCarthy, 96 U. S. 258, 267 (1877); Eagan v. Maguire, 21 R. I. 189; 42 Atl. 506 (1899); Baldwin v. Barney, 12 R. I. 392; 34 Am. R. 670 (1879).

employee who was required to use the appliances, in ignorance of their defective condition, was the same on one day as on another. That they were being used on Sunday, rather than on Monday, neither contributed to, nor was it the efficient cause of, the injury which gave rise to this action, nor can the railroad company now interpose and become the champion of the Sunday law as an excuse for its wrong, or to defeat a recovery.'"[1]

In Massachusetts, however, before the passage of Statute 1884, ch. 37, a violation of the Sunday law was regarded as inseparably connected with the cause of action and as contributing to the employee's injury. The employee was said to participate in illegal work, and the law would not aid him to recover damages for the consequences of his own illegal act.[2]

By the Statute 1884, ch. 37, it was declared that the provisions of the Sunday law "shall not constitute a defense to an action for a tort or injury suffered by a person on the Lord's day."[3]

Whether or not the plaintiff's violation of the Sunday law of the state of injury prevents a recovery for the defendant's negligence, is a question of local law, upon which the federal courts are bound to follow the state decisions construing the statute. The supreme court of the United States has accordingly held that a passenger injured in Massachusetts before the passage of the statute of 1877, ch. 232, could not recover damages from the negligent railroad company, if he was traveling on Sunday,

[1] Louisville &c. R. Co. v. Buck, 116 Ind. 566, 570, 571; 19 N. E. 453; 2 L. R. A. 520; 9 Am. St. 883; citing Sutton v. Town of Wauwatosa, 29 Wis. 21; 9 Am. R. 534.

[2] McGrath v. Merwin, 112 Mass. 467; 17 Am. R. 119 (1873); Day v. Highland St. R. Co., 135 Mass. 113 (1883); Read v. Boston &c. R. Co., 140 Mass. 199; 4 N. E. 227 (1885).

[3] Re-enacted in Rev. Laws 1902, ch. 98, § 17; Jordan v. New York &c. R. Co., 165 Mass. 346; 43 N. E. 111; 32 L. R. A. 101; 52 Am. St. 522 (1896).

not for necessity or charity, although this rule of Massachusetts law was opposed to the views of the supreme court of the United States on general principles, and that court had previously decided otherwise.[1]

In this case, however, the action was brought in the circuit court of the United States for the district of Massachusetts, and the federal courts were bound by the act of congress to follow the Massachusetts rule. If the action had been brought in the courts of another state, or in a federal court sitting in another state, the result might have been different. Thus in Baldwin v. Barney (R. I.),[2] the plaintiff, while driving in Massachusetts in violation of the Sunday law, was carelessly run into by the defendant, and it was held in an able opinion by Chief Justice Durfee that he was entitled to recover damages, notwithstanding the Massachusetts decisions to the contrary, for the reason that the act of traveling on Sunday was not the immediate and proximate cause of the accident, but merely a condition or incident.

§ 28. Constitutionality of Employers' Liability Acts.— In Massachusetts and Alabama the constitutionality of the acts has not been expressly adjudged by the supreme court, but the acts have been enforced in so many cases as virtually to put the question at rest.[3]

Several objections to the constitutionality of the Indiana act have been overruled by the supreme court of the United States and by the supreme court of the state,[4] and

[1] Bucher v. Cheshire R. Co., 125 U. S. 555; 8 S. Ct. 974 (1888); s. c., Bucher v. Fitchburg R. Co., 131 Mass. 156.

[2] 12 R. I. 392; 34 Am. R. 670 (1879).

[3] See Norton v. City of New Bedford, 166 Mass. 48, 52; 43 N. E. 1034 (1896); Richmond &c. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800 (1893).

[4] Tullis v. Lake Erie &c. R. Co., 175 U. S. 348; 20 S. Ct. 136 (1899); Pittsburg &c. R. Co. v. Montgomery, 152 Ind. 1; 49 N. E. 582; 71 Am. St. 301 (1898); Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943 (1901.)

one objection to section 4,[1] concerning injuries received in other states, has been sustained.[2] The cases relating to railroads and their employees are further discussed in the chapter on Liability Peculiar to Railroad Employers.[3]

In Colorado the question seems to be settled. The court of appeals held that the Colorado Employers' Liability Act of 1893 was unconstitutional under the state constitution in so far as it gives a right of action to persons other than agents, servants and employees, because such right of action is not expressed in the title.[4] But the supreme court reversed this judgment, for the reason that the word "damages," as used in the title, is synonymous with "injuries," and held, therefore, that a mother could recover damages for the death of her son while in defendant's employ.[5]

§ 29. Constitutionality of state statute giving right of action for injury suffered in another state.—There is some conflict of judicial opinion upon the question as to whether a state has the power to give a right of action to and against its own citizens for a personal injury suffered in another state where no right of action exists by the law of such latter state. In North Carolina and in Indiana the constitutionality of such a statute has been assumed,[6] and in New York there is a strong dictum by Judge Denio in Whitford v. Panama R. Co.,[7] as follows:

"It is no doubt within the competency of the legislature to declare that any wrong which may be inflicted

[1] Burns R. S. Ind. 1901, § 7086.

[2] Baltimore &c. R. Co. v. Reed, 158 Ind. 25; 62 N. E. 488.

[3] Post, §§ 122, 123.

[4] Mitchell v. Colorado Elevator &c. Co., 12 Colo. App. 277; 55 Pac. 736 (1898).

[5] Colorado Milling &c. Co. v. Mitchell, 26 Colo. 284; 58 Pac. 28 (1899).

[6] Williams v. Southern R. Co., 128 N. C. 286; 38 S. E. 893; Pittsburgh &c. R. v. Hosea, 152 Ind. 412; 53 N. E. 419.

[7] 23 N. Y. 465, 471.

upon a citizen of New York abroad may be redressed here, according to the principles of our law, if the wrongdoer can be found here, so as to be subjected to the jurisdiction of our courts." The court then proceeds to state the reasons for confining the operation of the statute to injuries received in New York, as a matter of construction or legislative intent.

In North Carolina, the fellow-servant act of 1897 gives a right of action to an employee of "any railroad company operating in this state, who shall suffer injury to his person" by reason of the negligence of a fellow servant. In Williams v. Southern R. Co. (N. C.)[1] the plaintiff was injured in Tennessee while unloading iron rails from a gondola-car, by the negligence of his coemployee in the service of the defendant, the locomotive-engineer. There was no proof as to what was the law of Tennessee. It was held by a majority of the court that the fact that the injury occurred in Tennessee had no bearing on the case, and that the action was governed by the fellow-servant act of North Carolina, for the reason that the action was not in tort ex delicto, but ex contractu for breach of contract; for although a tort was alleged, it was based on contract;[2] and as the defendant was a resident of the state of North Carolina, its courts had jurisdiction to enforce the contract. The question of the constitutionality of the act, as thus construed, was not considered by the court. The court said (p. 288): "Of course, the courts of Tennessee would not be bound to observe this act, but the courts of this state are." Judges Clark and Montgomery concurred in a judgment for the plaintiff upon the ground that by the law of Tennessee the de-

[1] 128 N. C. 286; 38 S. E. 893 (1901)

[2] Furches, J., who delivered the opinion of the majority, cited in support of the proposition that the action was ex contractu the case of Farwell v. Boston &c. R. Co., 4 Met. (Mass.) 49; 38 Am. D. 339.

fendant was liable for such an injury, notwithstanding the fact that the plaintiff and the engineer were fellow servants.[1]

In Mulhall v. Fallon (Mass.),[2] which was brought under the Massachusetts Employers' Liability Act, although no constitutional question was raised or decided, Chief Justice Holmes observed: "However this [question as to the right of a non-resident alien to claim the benefit of the act] may be decided, it is not to be decided upon any theoretic impossibility of Massachusetts' law conferring a right outside her boundary lines." And the court cites in support of the conclusion that a non-resident alien could recover under the act, Mannville Co. v. City of Worcester (Mass.)[3] and other cases deciding that a recovery may be had in one state for damage sustained in another state by reason of the defendant's tort.

§ 30. Same—Section 4 of Indiana Employers' Liability Act held unconstitutional.—The Employers' Liability Act of Indiana, acts of 1893, ch. 130, § 4,[4] expressly declares that—

"Section 4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana, and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured, as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state."

[1] Citing Nashville &c. R. Co. v. Carroll, 6 Heisk. (Tenn.) 347, 362; Louisville &c. R. Co. v. Collins, 2 Duv. (Ky.) 114.

[2] 176 Mass. 266, 267; 57 N. E. 386.

[3] 138 Mass. 89.

[4] Burns R. S. Ind. 1901, § 7086.

This clause of the Indiana Employers' Liability Act was enforced by the Indiana supreme court in Pittsburgh &c. R. Co. v. Hosea (Ind.),[1] where a citizen of Indiana had been personally injured in Kentucky, and it was held that he could maintain an action under the Indiana Employers' Liability Act. In this case, however, the constitutionality of this clause was not discussed by the court. In the later case of Baltimore &c. R. Co. v. Reed (Ind.),[2] the question was fully discussed by the court and the statute declared to be unconstitutional chiefly upon the ground that it deprived the employer of a vested right of defense which existed under the law of Illinois, where the injury happened. The plaintiff, a brakeman, was injured by the negligence of the locomotive-engineer in suddenly starting the train, and in the trial court recovered a verdict of $15,000 against the railroad company under the Indiana Employers' Liability Act. The supreme court held that the rights of the parties were controlled by the law of the state in which the injury occurred, and that as the law of Illinois gave no right of action for an injury occasioned to one employee by reason of the negligence of a fellow servant, the plaintiff could not recover for such an injury even in Indiana, and that the legislature of Indiana had no power to change the rights of the parties upon this question, although the plaintiff was a citizen of Indiana and the defendant operated a railroad in Indiana as well as in Illinois.

The reasoning of the court in this case is not entirely satisfactory, especially in holding that the defendant had a vested right of defense in the law of another state. The accident to the plaintiff occurred on June 8, 1897, long after the Indiana Employers' Liability Act took effect. It can not be said, therefore, that the act in question de-

[1] 152 Ind. 412; 53 N. E. 419.
[2] 158 Ind. 25; 62 N. E. 488.

prived the defendant of any vested right of property, because the defendant possessed no vested right at the time when the statute was passed. It was not necessary to give the Indiana act a retrospective operation in order to sustain the action, and that objection to the validity of the statute does not apply to the case in judgment. That the fellow-servant rule was a defense in Illinois does not prove that it is a defense in Indiana for injuries received in Illinois, even if there were no Indiana statute declaring that the law of the state of injury shall not constitute a defense in Indiana. When the suit is based upon the law of another state, the plaintiff must show a right to recover under the law of such state. But when the suit is based upon the law of the forum, as it was in the Indiana case, Baltimore &c. R. v. Reed (Ind.),[1] under the Employers' Liability Act of Indiana, it is not necessary for the plaintiff to show a right to recover under the law of the other state in which the injury was received, but only that the defendant's act was wrongful in that state, and that he has a right to recover under the law of the forum. The Indiana statute conferred the right to recover in terms, notwithstanding the fact that the accident occurred outside of Indiana, and the plaintiff's right of action was not based upon the law of Illinois, but upon the law of Indiana. The defendant's act was not justifiable in Illinois, and the law of Illinois, therefore, was no answer to the plaintiff's action founded upon the Indiana statute. The question was not which law should govern the case, but whether the action could be maintained in Indiana under the Indiana statute.

Although under the law of Illinois the plaintiff's injury was not actionable, yet the defendant's conduct was clearly wrongful, and was not justifiable by the law of that state.

[1] 158 Ind. 25; 62 N. E. 488.

This distinction seems to apply to this case, and it has been recently drawn in two English cases of authority.[1] The plaintiff's injury being actionable if it had been sustained in Indiana, and being wrongful and unjustifiable in Illinois, it follows that the action is maintainable in Indiana upon general principles. It could be maintained without such a statute, and therefore the statute is constitutional.

In Phillips v. Eyre,[2] Willes, J., says: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have been *actionable* if committed in England. * * * Secondly, the act must not have been *justifiable* by the law of the place where it was done."

In the later case of Machado v. Fontes[3] the court of appeal quoted the above passage from the opinion of Mr. Justice Willes with approval in support of the judgment that it was no defense to an action in England for a libel published in Brazil to show that no action could be maintained in Brazil for the same tort. It was held to be *wrongful*, though not *actionable*, in Brazil to publish the libel in question. Its publication was not "justifiable" in Brazil, and as it was actionable in England, it was decided that the action could be maintained there in any court having jurisdiction of the parties.

Baldwin v. Barney (R. I.)[4] also supports the view that, when the action is based upon the law of the forum, the fact that no recovery could be had in the state of injury does not preclude a recovery in the state of process,

[1] Phillips v. Eyre, L. R. 6 Q. B. 1; Machado v. Fontes, (1897) 2 Q. B. 231.

[2] L. R. 6 Q. B. 1, 28.

[3] (1897) 2 Q. B. 231.

[4] 12 R. I. 392; 34 Am. R. 670 (1879).

where the defendant's act is wrongful. In this case, while the plaintiff was driving on Sunday in Massachusetts, he was injured by the negligent driving of the defendant. At the time of the accident, no action could be maintained in Massachusetts because the plaintiff was violating the Sunday law by driving neither for necessity nor for charity. The Rhode Island court held, however, that the law of Massachusetts was no defense to this action brought in Rhode Island. The plaintiff did not claim under the Massachusetts law but under the Rhode Island law. A violation of the Sunday law by the plaintiff was no defense to the action for negligence according to the law of Rhode Island, and the defendant's act was wrongful in Massachusetts, and the plaintiff was therefore entitled to recover damages in Rhode Island.[1] If the plaintiff had based his right to recover upon the law of Massachusetts, the Rhode Island court would have decided against him.

If the cause of action were regarded as arising from the employer's breach of contract to furnish reasonably safe ways, works, machinery, etc., as it is in North Carolina and Ohio,[2] no one would contend that this clause of the Indiana Employers' Liability Act was unconstitutional, especially when the contract is made and partly performed in Indiana, between a citizen of that state and a railroad corporation doing business therein.[3] It would seem that

[1] See also, Holmes v. Barclay, 4 La. An. 63 (1849); Huntington v. Attrill, 146 U. S. 657, 670; 13 S. Ct. 224 (1892); Cragin v. Lowell, 88 N. Y. 258 (1882); Companhia de Mosambique v. British South Africa Co., (1892) 2 Q. B. 358; British South Africa Co. v. Companhia de Mosambique, (1893) A. C. 602.

[2] Williams v. Southern R. Co., 128 N. C. 286; 38 S. E. 893 (1901); Railway Co. v. Ranney, 37 Ohio St. 665, 669; Alexander v. Pennsylvania Co., 48 Ohio St. 623, 636; 30 N. E. 69.

[3] Atwood v. Walker, 179 Mass. 514; 61 N. E. 58 (1901).

this construction should be given to the statute to sustain its constitutionality.

"The respective rights and duties of employer and employee sound in contract," said Mr. Justice McIlvaine in Railway Co. v. Ranney (Ohio).[1] "The employer impliedly engages to use reasonable care and diligence to secure the safety of the employee, and among other things, to exercise reasonable care in the selection of prudent fellow servants. He also engages that every one placed in authority over the servant, with power to control and direct him in the performance of his duties, will exercise reasonable care in providing for his safety, whether such superior be a fellow servant or not, in the ordinary sense."

The early adoption of the "superior servant" rule by the supreme court of Ohio entitles its views upon this question to more than ordinary weight and consideration.

Decisions that an employee assumes the risk of dangers incident to his work generally emphasize the view that assumption of risk arises from an implied term in the contract of employment, and that the doctrine has no application when the relation of master and servant does not exist. Thus Chief Justice Shaw observed in the leading case upon this subject, which in form was an action of trespass upon the case: "The implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied."[2]

So, in holding that an employee does not assume the

[1] 37 Ohio St. 665, 669.

[2] Farwell v. Boston &c. R. Co., 4 Met. (Mass.) 49, 60; 38 Am. D. 339 (1842); O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 136; 32 N. E. 1119 (1893).

risk arising from the breach of a duty personal to the employer, the courts frequently put the decision upon the ground that such risk is not included in the contract of service. "There was no such bargain between the parties," remarked Mr. Justice Danforth, in a case of this character, "and public policy forbids that one should be implied."[1]

§ 31. Same—Fourteenth amendment.—Moreover, a state statute which destroys a vested right of defense is not contrary to the fourteenth amendment in a case of this nature, when there has been no change of title to property.

In Campbell v. Holt[2] it was held that the repeal of a state statute of limitations relating to actions on personal debts did not deprive a debtor of his property in violation of the fourteenth amendment, although at the time of the repeal of the statute the defense had become vested in the defendant. In that case it was much insisted that the right to defense is a vested right of property which is protected by the constitution of the United States, but the court held that there was no "property" in the bar of the statute of limitations as a defense to his promise to pay a debt. It is equally difficult to see how there can be any "property" in the fellow-servant law of another state, particularly when the action is brought in the state of the common domicil of the two parties. There is nothing inherently unjust in subjecting an employer to the same liability for negligent acts committed in other states as for acts of the like nature committed in the state of his domicil, or, in the case of a corporation, of its doing business. A contrary doctrine would allow a citizen of Massachusetts, for example, to escape liability entirely for a tort committed on the high seas, or on land not under the sovereignty of any civilized country.

[1] Sheehan v. New York &c. R. Co., 91 N. Y. 332, 339 (1883).
[2] 115 U. S. 620; 6 S. Ct. 209.

The strongest ground apparently upon which the decision can be placed is that the legislature of Indiana possessed no power to impose a liability upon a defendant for an act committed in Illinois, which act, where committed, did not render the defendant liable in damages to the plaintiff. The case of Allgeyer v. Louisiana[1] lends some support to this view, but in this case the Louisiana statute materially restricted the defendant's liberty of contract and imposed a criminal liability upon him for an innocent act performed in another state; namely, taking out a policy of insurance on his property. The Louisiana act was, therefore, an attempt to extend its criminal laws, and not merely its civil laws, beyond the jurisdiction of Louisiana, and to make that which was no offense against the sovereignty where committed an offense against the sovereignty of Louisiana. "It would be a manifest incongruity for one sovereignty to punish a person for an offense committed against the laws of another sovereignty."[2] "The point decided [in Allgeyer v. Louisiana] was that a statute of a state punishing the owner of property for obtaining insurance thereon in another state was unconstitutional."[3]

If a contract exempting the defendant from liability had been executed by the plaintiff, and had been valid according to the law of Illinois, but void according to the law of Indiana, and the defendant had been made liable to fine or imprisonment under the Employers' Liability Act for making such a contract, the latter act might deprive the defendant of "liberty" or "property" without due process of law, contrary to the fourteenth amend-

[1] 165 U. S. 578; 17 S. Ct. 427.

[2] Ex parte Bridges, 2 Woods 428, 430; Huntington v. Attrill, 146 U. S. 657, 672; 13 S. Ct. 224.

[3] Per Gray, J., for the court, in Nutting v. Massachusetts, 183 U. S. 553, 557; 22 S. Ct. 238 (1902).

ment, and might fall within the principles of Allgeyer v. Louisiana. But no such contract existed between the parties to the Indiana case, and the legislature of Indiana had not imposed any criminal liability upon the defendant for doing an act which was innocent in the state of performance. The statute merely fixes the civil rights of citizens who are employees of a railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, for negligent acts committed by the railroad company in such other state.

There are many cases in which a state may fix the civil rights and liabilities of its citizens in its own courts for acts performed in other states, without contravening the constitution of the United States. Thus, a resident creditor of an insolvent debtor may be enjoined from prosecuting an action brought in another state to collect the debt, although the law of the latter state permits such an action to be maintained in its courts; and such action by the state of the parties' domicil does not deprive the creditor of any constitutional rights.[1]

So, a state statute is constitutional which forbids a resident creditor from sending his claim out of the state for collection, or from assigning the claim to a non-resident for the purpose of collection, contrary to the exemption law of the parties' domicil, and which makes him liable in a civil action for damages to his debtor.[2]

[1] Cole v. Cunningham, 133 U. S. 107; 10 S. Ct. 269; affirming s. c. sub nom. Cunningham v. Butler, 142 Mass. 47; 6 N. E. 782; Dehon v. Foster, 4 Allen (Mass.) 545; Sercomb v. Catlin, 128 Ill. 556; 21 N. E. 606; 15 Am. St. 147; Hawkins v. Ireland, 64 Minn. 339; 67 N. W. 73; 58 Am. St. 534.

[2] Sweeny v. Hunter, 145 Pa. St. 363; 22 Atl. 653; 14 L. R. A. 594. If the statute should impose a fine or imprisonment upon the creditor, it would deprive him of liberty or property without due process of law, contrary to the fourteenth amendment to the United States constitution, in accordance with the principles of Allgeyer v. Louisiana, 165 U. S. 578; 17 S. Ct. 427.

The Indiana Employers' Liability Act is not an attempt to extend its penal laws beyond its own territory, and to punish a person criminally for an act committed in another state. Such was the nature of the Louisiana statute declared unconstitutional in Allgeyer v. Louisiana.[1] The Indiana act does not impose any punishment upon the employer as an offender against the state, but merely affords a private remedy to an employee who has been injured by the negligent act of the railroad employer in Indiana or another state. Criminal liability is tested and can be enforced only by the state or nation whose laws have been violated, because it is the injured party.[2] But a tort is not a crime, and the liability for a tort is civil and not criminal in its nature. The injured party is not the state, but the employee. Even if a state has no power to impose a civil liability upon citizens of other states for torts committed without its limits, it may possess the power to impose such a liability upon its own citizens or corporations for torts committed in other states, which may be enforced by action in its own courts, if jurisdiction of the defendant be obtained.

The circumstance that, irrespective of statute, the question of liability for tort is governed by the law of the place where the tort is committed, does not show that this rule of law can not constitutionally be changed by a statute of the defendant's state, so as to fix a higher liability upon the defendant when sued in his own state than when sued in the state of injury. This is especially true with respect to corporations and their stockholders. A state, for instance, which creates a corporation may impose a higher liability upon it or its stockholders than another state in which it does business, and the fact that the cause

[1] 165 U. S. 578; 17 S. Ct. 427.

[2] Post, chapter on Conflict of Laws, § 254.

of action against it arises in another state does not render the statute unconstitutional, or prevent its enforcement by the courts of the state of incorporation.

On the contrary, it is now settled that where the statutory liability imposed by the state of origin is not penal in its nature but is only to secure a private remedy, it will be enforced in any court of competent jurisdiction, irrespective of where the cause of action arose, although the state of suit does not impose such liability.[1] And where the terms of the charter show that the corporation is created for the purpose of doing business in another state, its stockholders are also subject to the greater liabilities imposed by the laws of such other state on all business transacted therein.[2]

§ 32. Recovery over by employer.—It has recently been decided in Massachusetts and in England that in certain cases an employer who has paid his employee for personal injuries sustained in his service by reason of negligence, may recover over such damages from a third person who was the first and principal wrong-doer, although the injuries could have been prevented by the exercise of due care on the part of the employer.[3] The ordinary doctrine of contributory negligence does not apply to this state of facts. The fact that the employer was negligent

[1] Flash v. Conn, 109 U. S. 371; 3 S. Ct. 263; Huntington v. Attrill, 146 U. S. 657; 13 S. Ct. 224; Whitman v. Oxford Nat'l Bank, 176 U. S. 559; 20 S. Ct. 477; Hancock Nat'l Bank v. Farnum, 176 U. S. 640; 20 S. Ct. 506; Ward v. Joslin, 186 U. S. 142; 22 S. Ct. 807 (1902); Hancock Nat'l Bank v. Ellis, 172 Mass. 39; 70 Am. St. 232; 51 N. E. 207; Bell v. Farwell, 176 Ill. 489; 52 N. E. 346; 68 Am. St. 194; 42 L. R. A. 804; Guerney v. Moore, 131 Mo. 650; 32 S. W. 1132; Western Nat'l Bank v. Lawrence, 117 Mich. 669; 76 N. W. 105; Ferguson v. Sherman, 116 Cal. 169; 47 Pac. 1023; 37 L. R. A. 622.

[2] Pinney v. Nelson, 183 U. S. 144; 22 S. Ct. 52 (1901).

[3] Boston Woven Hose &c. Co. v. Kendall, 178 Mass. 232; 59 N. E. 657; 51 L. R. A. 781 (1901); Mowbray v. Merryweather, (1895) 1 Q. B. 857; (1895) 2 Q. B. 640.

toward his employee does not prevent a recovery over by the employer against the third person, whose negligence was the active cause of the injuries; on the contrary, unless the employer was negligent toward his employee, payment by him would be voluntary and not required by law, and therefore could not be recovered from a third person.[1]

In order to render such third person liable over to the employer, the former's negligence must be the active cause of the original injuries, and the employer's negligence must be merely of a passive nature, such as a failure to inspect a machine or appliance purchased or hired from such third person, with a warranty or representation of its strength. If the employer participate actively in the injuries he becomes a joint tort-feasor with the third person, and neither can recover over from the other any damages which he pays the injured person.[2]

The circumstance that the defective tool or article which the third person has furnished is in the possession and control of the employer at the time of the injury does not prevent his recovery over. In this respect the case differs from the ordinary case, and is an exception to the rule that liability for a defective object ceases when the possession or control of the object is changed.[3] The liability of the maker of the defective article continues, and can be enforced by the purchaser notwithstanding the title, the

[1] Roughan v. Boston &c. Block Co., 161 Mass. 24; 36 N. E. 461; Kiddle v. Lovett, 16 Q. B. 605; Cincinnati &c. R. Co. v. Louisville &c. R. Co., 97 Ky. 128; 30 S. W. 408.

[2] Gray v. Boston Gas Light Co., 114 Mass. 149, 154; Churchill v. Holt, 131 Mass. 67; 41 Am. R. 191; s. c. 127 Mass. 165; 34 Am. R. 355; Old Colony R. Co. v. Slavens, 148 Mass. 363; 12 Am. St. 558; 19 N. E. 372.

[3] Glynn v. Central R. Co., 175 Mass. 510; 56 N. E. 698; Curtin v. Somerset, 140 Pa. St. 70; 21 Atl. 244; 23 Am. St. 220; 12 L. R. A. 322; Losee v. Clute, 51 N. Y. 494; 10 Am. R. 638; Necker v. Harvey, 49 Mich. 517; 14 N. W. 503; Collis v. Selden, L. R. 3 C. P. 495; Griffin v. Jackson Light & Power Co., 127 Mich. —; 87 N. W. 888; 55 L. R. A. 318 (1901).

possession and the control of the article were in the employer, or purchaser, at the time of the injury to the employee, and the employer could have discovered the defect by inspection before the accident.

These questions were decided in Boston Woven Hose &c. Co. v. Kendall (Mass.),[1] where the plaintiff purchased a boiler from the defendants upon the latter's representation that it would stand a working pressure of 100 pounds per square inch. While the boiler was in use by the plaintiff at a pressure of less than 100 pounds, the packing was blown out, the naphtha vapor inside the boiler escaped into the air, ignited and injured several of the plaintiff's employees. There was a defect in the hinge, due to the defendants' negligent construction, which exposed the packing to a greater pressure than was safe or proper; but this defect could have been discovered and remedied before the accident by the plaintiff by the exercise of due care and inspection.

It was held that the defendants were liable to the plaintiff for the amount it had paid to its injured employees, that amount being reasonable compensation for their injuries.[2]

[1] 178 Mass. 232; 59 N. E. 657; 51 L. R. A. 781 (1901).

[2] In delivering the opinion of the court, Chief Justice Holmes said: "The judge allowed the plaintiff to recover a verdict on proving as it did to the satisfaction of the jury that it was liable for the damages which it paid, and also that, although negligent as toward its servants, it had shown all the care which the defendants had a right to expect.

"We are fully aware of the difficulties in the way of holding a person liable for damage when the tort of another has intervened between his act and the result complained of: Glynn v. Central R. Co., 175 Mass. 510, 511; 56 N. E. 698, and cases cited. Nevertheless it is held by our decisions that in some cases of that sort there may be a recovery, and this seems to be recognized in the case upon which the defendants chiefly rely: Nashua Iron and Steel Co. v. Worcester &c. R. Co., 62 N. H. 159. The defendants, to bring themselves within the distinctions there taken, insist that we must assume that the plaintiff here might have prevented the accident by ordinary care, because it must have

In Mowbray v. Merryweather[1] the plaintiff failed to discover or remedy a defect in a chain which the defendant had furnished for the work; the chain broke and injured an employee of the plaintiff. The employee sued the plaintiff under the English Employers' Liability Act of 1880, and before trial the action was settled by the payment of £125. This present action was brought to recover the £125 which the plaintiff had paid his em-

been held liable on the ground of a want of such care, and that, in such a case at least, it can not make the defendants indemnify it.

"We are of opinion that the plaintiff is entitled to hold its verdict, and that if indemnity ever is to be recovered, short of an express contract of insurance, for what is in form the result of a tort on the plaintiff's part, this case belongs to the class in which it should be allowed. The plaintiff's misconduct consisted in a failure to discover by inspection a defect in an article specially made for it and probably not falling within the exceptional rule as to well-known articles made by reputable makers and sold in the market ready for use: Shea v. Wellington, 163 Mass. 364, 369; 40 N. E. 173. Such a failure might make the plaintiff answerable to its men, but even if its conduct be called want of ordinary care, it was induced, as we must assume after the verdict, by the warranty or representations of the defendants. The very purpose of the warranty was that the boiler should be used in the plaintiff's works with reliance upon the defendant's judgment in a matter as to which the defendants were experts and the plaintiff presumably was not. Whether the false warranty be called a tort or a breach of contract, the consequence which ensued must be taken to have been contemplated and was not too remote.

"The fact that the reliance was not justified as toward the men does not do away with the fact that the defendants invited it with notice of what might be the consequences if it should be misplaced, and there is no policy of the law opposed to their being held to make their representations good. See St. 1894, ch. 522, § 29. The New Hampshire decision is not against it, and there is an English case which went to the court of appeal which is very much in point: Mowbray v. Merryweather, (1895) 1 Q. B. 857; (1895) 2 Q. B. 640. It is intimated in that case that the workman himself could have recovered in the first place against the defendant. Whether that is a necessary condition of a recovery over we need not consider. See City of Holyoke v. Hadley Water Power Co., 174 Mass. 424, 428; 54 N. E. 889; Consolidated &c. Co. v. Bradley, 171 Mass. 127, 134; 50 N. E. 464; 68 Am. St. 409."

[1] (1895) 2 Q. B. 640.

ployee. The plaintiff could have discovered the defect by the exercise of due care. It was held by the court of appeal, consisting of Lord Esher, M. R., and Kay and Rigby, JJ., that the defendant was liable to the plaintiff for the full amount claimed; that the plaintiff, though negligent toward his employee, had not been negligent toward the defendant, who had warranted the chain to be suitable for the work in hand; and that the damages were not too remote, as such an injury was within the reasonable contemplation of the parties.

Kay, L. J., said (p. 645): "The defense set up is that they (the plaintiffs) would not have been liable to pay that sum unless they had been negligent, and that their liability to the workman did not therefore arise solely from the defect in the chain, but from that and their negligence. I can not see that the fact that the plaintiffs would not have been liable without negligence towards the workman relieves the defendant from the consequences of his breach of contract. The plaintiffs were guilty of no negligence as between themselves and the defendant." "The defendant can not rely on a duty to use due care which was owed, not to him, but to the workman."[1]

The Workmen's Compensation Act 1897, section 6, provides as follows upon this subject:

"6. Where the injury for which compensation is payable under this act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed either at law against that person to recover damages, or against his employer for compensation under this act, but not against both, and if compensation be paid under this act, the employer shall be entitled to be indemnified by the said other person."[2]

[1] Per Esher, M. R., p. 643.
[2] 60 and 61 Vict., ch. 37.

§ 33. Established principles of recovery over.—The doctrine of recovery over has been most frequently applied in favor of municipal corporations.[1]

The right to recover over, is, however, not limited to municipal corporations, but is possessed by individuals and by private corporations. The rule is of general application. It has been applied to many different classes. An employer may recover over from his employee damages which he had been obliged to pay to a third person by reason of the employee's negligence.[2] A railroad company may recover over from a carrier of mail-bags damages which it had been obliged to pay to a passenger by reason of the negligence of the mail-carrier's servants in leaving the mail-bags on a sidewalk of the railroad's passenger-station.[3] A house-owner may recover over from a gaslight company damages which he was legally bound to pay and had paid to a highway traveler by reason of the unwarranted act of the gaslight company in fastening a wire to the house's chimney, which pulled the chimney down upon the traveler.[4] A gaslight company may recover over from a street-railway company damages

[1] City of Holyoke v. Hadley Water Power Co., 174 Mass. 424; 54 N. E. 889; City of Boston v. Coon, 175 Mass. 283; 56 N. E. 287; Inhabitants &c. v. Boston &c. R. Co., 23 Pick. (Mass.) 24; 34 Am. D. 33; Washington Gas Co. v. District of Columbia, 161 U. S. 316; 16 S. Ct. 564; Chicago City v. Robbins, 2 Black 418; Inhabitants &c. v. Penobscot R. Co., 49 Me. 119. In Massachusetts it is held that a city has a special interest arising out of its statutory liability, which gives it a right independent of subrogation: City of Holyoke v. Hadley Water Power Co., 174 Mass. 424, 428; 54 N. E. 889, and cases cited by Holmes, C. J.

[2] Grand Trunk R. Co. v. Latham, 63 Me. 177; Smith v. Foran, 43 Conn. 244; 21 Am. R. 647.

[3] Old Colony R. Co. v. Slavens, 148 Mass. 363; 19 N. E. 372; 12 Am. St. 558.

[4] Gray v. Boston Gas Light Co., 114 Mass. 149.

which it had paid to a gas consumer by reason of the negligent breaking of a gas-pipe by the workmen employed by the street-railway company.[1]

If the sum paid to the injured employees be no more than reasonable compensation for their injuries, the fact that the employer paid such sum without a judgment against him, or even without an action at law, does not bar his recovery over against the active cause of the damage.[2]

Recovery over does not depend upon the existence of a contractual relation;[3] but if the cause of action involves a breach of warranty as well as negligence on the part of the defendant toward the plaintiff, the right to recover over seems to be somewhat clearer than if no contract existed. A count in contract may be joined with a count in tort, and either count will support a general verdict. This is especially true if the contract contains a warranty of fitness of the defective article, and the plaintiff's neglect to inspect and discover the defect in the article is induced by reliance on the defendant's warranty or representations.

Whether the false warranty be called a tort or a breach of contract, the consequent injuries to the plaintiff's employees must be taken to have been contemplated, and the damage to the plaintiff is not too remote.[4]

[1] Philadelphia Co. v. Central Traction Co., 165 Pa. St. 456; 30 Atl. 934.

[2] Mowbray v. Merryweather, (1895) 1 Q. B. 857; (1895) 2 Q. B. 640; Inhabitants &c. v. Chase, 16 Gray (Mass.) 303; Smith v. Foran, 43 Conn. 244; 21 Am. R. 647.

[3] Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461; 31 N. E. 987; 30 Am. St. 685.

[4] Mowbray v. Merryweather, (1895) 2 Q. B. 640; Boston Woven Hose &c. Co. v. Kendall, 178 Mass. 232; 59 N. E. 657; Nashua Iron Co. v. Brush, 91 Fed. 213; 33 C. C. A. 456; Dushane v. Benedict, 120 U. S. 630; 7 S. Ct. 696; Tyler v. Moody, 110 Ky. —; 63 S. W. 433; 54 L. R. A. 417 (1901).

§ 34. Recovery over—Effect of former judgment after notice to defend the action.—As shown in the preceding sections, the passive agent in causing personal injuries to an employee may recover over against the active agent in causing the same injuries. If the employee brings an action against his employer, either at common law or under the Employers' Liability Act, and recovers a judgment therein, the employer by giving seasonable notice to the active agent may recover from such active agent the amount of the judgment, and the judgment will settle several important questions as between the parties in the subsequent action. Such a judgment will settle the questions of the employee's due care, and the employer's negligence, and the amount of damages.

The effect of a former judgment rendered against the passive agent in an action brought by the person who received the personal injuries has generally arisen between a municipal corporation which has paid damages to a traveler on its highway and a defendant who has been the active cause of the defect in the highway. A notice given by the city or town before the trial of the original action will be binding upon the active agent in the mischief if the person notified is called upon to come in and defend the suit and is given an opportunity to do so, and is seasonably informed that if he does not defend the suit he will be held responsible for the result. But the party notifying can not insist upon retaining control of the defense and yet hold the party notified bound by the result of the suit.[1]

[1] City of Boston v. Worthington, 10 Gray (Mass.) 496; 71 Am. D. 678; Inhabitants &c. v. Holbrook, 9 Allen (Mass.) 17; 85 Am. D. 735; Chamberlain v. Preble, 11 Allen (Mass.) 370; Elliot v. Hayden, 104 Mass. 180; Gray v. Boston Gas Light Co., 114 Mass. 149, 155; 19 Am. R. 324; Boyle v. Edwards, 114 Mass. 373; Inhabitants &c. v. Mayo, 122 Mass. 100, 109; 23 Am. R. 292; Richmond v. Ames, 164 Mass. 467, 474; 41 N. E. 671; 167 Mass. 265; 45 N. E. 919.

"In giving such a notice," says Chief Justice Field, "although the strict formalities of the ancient law are not now required, still, whatever its form, the notice should be such as to give the person notified information that he is called upon to come in and defend the suit if he chooses, and that he is to be held responsible for the result of the suit."[1]

In Consolidated &c. Co. v. Bradley (Mass.),[2] the plaintiff's employee, one John M. Tierney, was instantly killed by reason of a defect in the condition of certain electric-lighting apparatus which the defendant had furnished to the plaintiff and had agreed to keep in repair. Tierney's next of kin brought an action against the present plaintiff under the Employers' Liability Act of Massachusetts, and a few days before the case came up for trial the attorneys for the present plaintiff notified the present defendant that the case would come on for trial on Monday next in the second session of the superior court, and added, "We hope and expect to be able to win the case and thus relieve the parties from liability. In case, however, we should be beaten we shall look to you to recompense the machine company, and we shall expect you to assist in the conduct of the defense of the case." The case afterwards came on for trial and resulted in a verdict of three thousand dollars in favor of Tierney's next of kin against the present plaintiff. The present defendants were present in court at the trial of the first action but were not consulted as to the manner in which the defense should be conducted. The verdict was afterwards reduced to fifteen hundred dollars, and judgment was entered thereon, and this action was brought to recover the full amount of said judgment, with counsel fees and costs of court incurred in defending it. It was held

[1] Richmond v. Ames, 164 Mass. 467, 474; 41 N. E. 671.
[2] 171 Mass. 127; 50 N. E. 464; 68 Am. St. 409.

that the notice was not sufficient in form to make the judgment in the original suit conclusive upon the present defendants as to the amount to be recovered, because the notice implied that the counsel of the defendant in the original suit, the present plaintiff, intended to retain the control of the defense of that suit, and did not offer to surrender the control of the defense. "Whatever may be the form of such notice," says Chief Justice Field, "we think that under the circumstances in which it is given it should call upon the person notified to come in and defend the suit or should offer him an opportunity of doing so. The party notifying can not insist upon retaining control of the defense and yet hold the party notified bound by the result of the suit."[1]

If the defendant in the original suit defended against the active negligence of the defendant in the present action to recover over, and was not obliged to defend any misfeasance or active participation of his own in causing the original injury, the judgment rendered in the original action against the present plaintiff will be conclusive upon the present defendant if he had due notice of its pendency and an opportunity to defend, and the active agent in the injury will also be liable over for reasonable counsel fees and costs as well as for the amount of the original judgment.[2]

"If the party ultimately liable for his exclusive wrongdoing," says Mr. Justice Lord, "has notice that an intermediate party is sued for the wrong done by him, it is right legally and equitably that he take upon himself at once the defense of his own act, thereby settling the whole matter in a single suit; if he requires the intermediate party to defend there is no rule of law or of

[1] Consolidated &c. Co. v. Bradley, 171 Mass. 127, 132; 50 N. E. 464; 68 Am. St. 409.

[2] Westfield v. Mayo, 122 Mass. 100; 23 Am. R. 292.

morals which should relieve him of the consequences of his additional neglect of duty."[1]

On the other hand, if the defendant in the original suit was compelled to defend against some negligence of his own or of some person for whose negligence he is made liable by the Employers' Liability Act, and especially if the damages are, by virtue of the statute, "assessed with reference to the degree of culpability" of such person, then the judgment rendered in the original action will not be conclusive upon the other joint tort-feasor.

In Consolidated &c. Co. v. Bradley (Mass.),[2] the facts of which are stated above, it was held that if the defendants promised the plaintiff to keep the electrical apparatus in repair and failed to do so, they would be liable to the plaintiff for the breach of this promise, or if they undertook to repair the apparatus and repaired it negligently, in consequence of which the plaintiff suffered damage, they would be liable for such negligence; but that the judgment rendered against the present plaintiff in the original action brought against him by the next of kin of his employee was not conclusive upon the present defendant even if due and proper notice had been given to come in and defend the original action. "We are also of opinion," says Chief Justice Field, "that the original action was such that by any form of notice the present defendants could not necessarily, as matter of law, be held bound by the judgment in that action. The damages in that action were assessed with reference to the degree of culpability of the defendant therein, or of some person for whose negligence the defendant was made liable by statute 1887, ch. 270. The defendants in the present suit, if they are liable at all to the plaintiff, are liable at common law for the breach of their contract or of their

[1] Westfield v. Mayo, supra.
[2] 171 Mass. 127; 50 N. E. 464; 68 Am. St. 409.

duty. The defendant in the original action was defending against its own negligence or the negligence of persons for whom it was responsible" (p. 133).[1]

Even if the judgment, however, is not conclusive upon the defendant, the plaintiff may have a right of action to recover over the amount of the damage which he suffered by reason of the defendant's act, although it is less than the injured person recovered in the first action.[2]

Where the injured party has recovered judgment in a federal court against his employer, or other party secondarily liable, the latter's right to recover over in a state court against the first and principal wrong-doer is not defeated by the circumstance that the federal judgment proceeded upon a principle of law which was not considered sufficient to warrant a recovery in the courts of the state in question. The judgment of the federal court is entitled to full faith and credit under the constitution of the United States, and is conclusive upon the question of liability in the subsequent action in the state court. It precludes a re-examination of the merits as between the original parties in the first action.[3]

§ 35. Damages on recovery over.—In actions by a purchaser or hirer of a defective article to recover over from the manufacturer or owner of the article whose defective condition occasions personal injuries to the plaintiff's employees, for which the plaintiff pays under a legal obligation, it is now settled in Massachusetts and in England

[1] See also, Gray v. Boston Gas Light Co., 114 Mass. 149; Inhabitants &c. v. Boston &c. R. Co., 23 Pick. (Mass.) 24; 34 Am. D. 33.

[2] Inhabitants &c. v. Boston &c. R. Co., 23 Pick. (Mass.) 24; 34 Am. D. 33; Old Colony R. Co. v. Slavens, 148 Mass. 363; 19 N. E. 372; 12 Am. St. 558; Toomey v. Donovan, 158 Mass. 232; 33 N. E. 396.

[3] Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461; 31 N. E. 987; 30 Am. St. 685.

that the damages claimed are not too remote.[1] It is within the reasonable contemplation of the plaintiff and defendant that the article should be used or operated by the plaintiff's employees, and if they suffer personal injuries while using it with due care, by reason of its defective condition, due to the defendant's active negligence, and to the plaintiff's passive negligence in failing to discover the defect, the defendant should not be allowed to escape liability entirely, merely because the plaintiff's loss comes to him through his employees instead of through his property. If the plaintiff's goods or business had been destroyed or damaged by the defective article manufactured or sold to him by the defendant, with a representation or warranty that it was fit and suitable for the purpose in question, the damages would not be too remote.[2] The law imposes a liability upon an employer for neglect to provide reasonably safe ways, works and machinery, etc., but it does not require an employer to manufacture his own machinery, nor to construct his ways, works, or plant, himself. The relation between employer and employee is as close as the relation between a common carrier and a passenger, or that between a city and a traveler on its highways, in both of which cases it is settled that the damages paid to the passenger or to the traveler for personal injuries caused by negligence of a third person, without the active participation of the common carrier, or of the city, may be recovered back from the third person. The original liability grows out of the relation between the parties, and the law requires each class of persons to keep their premises safe. For failure or neglect to perform this legal duty the common carrier as well as the employer is liable to the injured person to the full extent

[1] Boston Woven Hose &c. Co. v. Kendall, 178 Mass. 232; 59 N. E. 657; Mowbray v. Merryweather, (1895) 2 Q. B. 640.

[2] Dushane v. Benedict, 120 U. S. 630; 7 S. Ct. 696.

of his injuries, although the act of a third person is the active cause of the injuries.

Where, however, the defendant manufactures an article for the plaintiff according to the plaintiff's directions, and there is no express or implied warranty that it is strong enough to do the work which the plaintiff sets it to do, the damages caused to a third person, who buys it from the plaintiff, by its breaking while in use by him, are remote and consequential as between the plaintiff and defendant, although the plaintiff is liable to his vendee for the whole amount of damage.[1]

In Connecticut it has been held that if an insured person is killed by the negligence of the defendant, the life-insurance company, after payment of the insurance policy, can not recover over from the defendant because the damages are too remote, and because no action exists at common law for the death of a human being.[2] The judgment in the above Connecticut case is undoubtedly sound upon the latter ground at common law,[3] but the former ground seems to be untenable. Fire- and marine-insurance companies have often recovered over against third persons for loss or damage to the property insured occasioned by the negligence of such third person,[4] and there seems to be no reason for applying a different principle to accident- or life-insurance companies.

In Boston Woven Hose &c. Co. v. Kendall (Mass.)[5] the action was brought for the benefit of an employers'-

[1] Nashua Iron &c. Co. v. Brush, 91 Fed. 213; 33 C. C. A. 456.

[2] Connecticut Ins. Co. v. New York &c. R. Co., 25 Conn. 265; 65 Am. D. 571.

[3] Insurance Co. v. Brame, 95 U. S. 754; Kellogg v. New York Central R. Co., 79 N. Y. 72. See also, Consolidated &c. Co. v. Bradley, 171 Mass. 127, 134; 50 N. E. 464; 68 Am. St. 409, where the plaintiff's employee was instantly killed.

[4] Hart v. Western R. Co., 13 Met. (Mass.) 99; 46 Am. D. 719; Mercantile Marine Ins. Co. v. Clark, 118 Mass. 288.

[5] 178 Mass. 232; 59 N. E. 657.

liability insurance company in the name of the employer to recover over damages paid for personal injuries to four employees, one of whom died before payment, occasioned by the defendant's negligence, and it was decided that the damages were not too remote.

Death and personal injury by accident or negligence of another are both legitimate subjects of accident-insurance,[1] and the insurance companies doing these forms of business seem to be entitled to the same rights of subrogation as the companies doing marine or fire insurance.

The amount of the plaintiff's liability to the injured person is not the measure of the defendant's liability over. Where a statute imposes a double liability upon a city for a defect in its highway, the person whose negligence caused the defect is not liable over to the city for double damages, but only for single damages.[2]

The person injured, however, is not entitled to double damages, or to full satisfaction from both the negligent persons, but merely to compensation from one or the other of the negligent persons. A release given to either will discharge the other negligent person.[3]

In the common-law courts, without an enabling statute, there can be no division of the damages between the negligent parties. When the active agent in the mischief

[1] Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404; 29 N. E. 529.

[2] Inhabitants &c. v. Boston &c. R. Co., 23 Pick. (Mass.) 24; 34 Am. D. 33. In this case, Judge Wilde for the court said (page 35): "They [the plaintiffs] are not, however, entitled to full indemnity, but only to the extent of single damages. To this extent only were the defendants liable to the parties injured; and so far as the plaintiffs have been held liable beyond that extent, they have suffered from their own neglect; and whether it was actual or constructive is immaterial. The damages were doubled by reason of the neglect of the town; . . . and they must be responsible for the increased amount of damages, and can not throw the burden on the defendants."

[3] Leddy v. Barney, 139 Mass. 394; 2 N. E. 107 (1885); Brown v. City of Cambridge, 3 Allen (Mass.) 474.

pays the injured person and sues the passive agent for contribution, he can not recover the whole or any part of the sum paid. When the passive agent in the mischief pays the injured person and sues the active agent he is entitled to judgment for the full amount. In other words, the whole loss must be borne by the active agent, although the negligence of the passive agent contributed to the original injury. The rule seems, therefore, to be harsh, and to need the intervention of the legislature to soften it. This might be accomplished by an act permitting the jury to apportion the loss between the two negligent parties in proportion to their respective degrees of culpability in causing the accident, when either sues the other for contribution.

§ 36. Does recovery over depend upon subrogation?—May the employer recover over from the person responsible for the active cause of the injuries to the employee, although such person is not legally liable to the employee? Is the master's right to recover over derived from and through his servant, or is it an independent right? Is the master's claim based solely upon subrogation, or is it a right personal to himself and dependent only upon payment in response to a legal demand?

There is some conflict of judicial opinion upon this question. In Mowbray v. Merryweather[1] it was stated by the judges that the injured workman himself could have recovered in the first place against the defendant, who furnished the defective chain to the plaintiff, and it was intimated that if the defendant had not been thus liable to the injured workman, he would not have been liable to the plaintiff, his employer, who paid the employee before bringing this action.

[1] (1895) 1 Q. B. 857; (1895) 2 Q. B. 640.

In Massachusetts the question has been left open for future decision, with respect to an employer's right to recover over,[1] but has been expressly decided with respect to the right of a municipal corporation to recover over against a person causing a defect in a highway. In City of Holyoke v. Hadley Water Power Co. (Mass.),[2] the city of Holyoke brought an action against the owner of some tenement-houses to recover the amount of a judgment rendered against the city in favor of a traveler on the highway, one Mrs. Chagnon, who was also a tenant of the defendant and occupied one of the tenements in front of which her injury occurred. The accident was a fall on a sidewalk of defendant's premises due to an accumulation of ice caused by a defective water-spout on defendant's house. The court assumed in favor of the defendant that Mrs. Chagnon could not have recovered against the defendant because as tenant she took the premises as she found them, with the defective water-spout, but held that this did not prevent the city from recovering over against the defendant, for the reason that the city had a right independent of subrogation and a special interest arising out of its statutory liability.[3] In this case the defendant would have been liable to a traveler who was not his tenant, and the mere fact that the traveler happened to be his tenant should not be allowed to lessen the rights of the city. The case would be different if the defendant were not legally liable to any class of persons for the accident.

[1] Consolidated &c. Co. v. Bradley, 171 Mass. 127, 135; 50 N. E. 464; 68 Am. St. 409; Boston Woven Hose &c. Co. v. Kendall, 178 Mass. 232, 237; 59 N. E. 657.

[2] 174 Mass. 424; 54 N. E. 889.

[3] Per Holmes, C. J., for the court, on page 428, citing Inhabitants &c. v. Sutton, 12 Met. (Mass.) 182, 189; Inhabitants &c. v. Eagle Mill Co., 138 Mass. 8, 10.

In New York it has been held, under a statute which imposed a liability upon the city for defects in its highways and upon the lot-owner only the expense of making repairs, that the city could not recover over from a lot-owner damages which it had paid to a traveler for personal injuries occasioned by a defect in a sidewalk, because the lot-owner was not liable to the traveler.[1]

The conclusion seems to be sound that when the defendant is not liable to any person in a direct action for the bodily injury in question, he is not liable over to a city or town in an indirect action to recover damages which the latter had been forced to pay for the same bodily injuries. Conversely, where the defendant is liable to some person in a direct action for the bodily injury in question, he may be liable over to a city or town to the extent of his original liability, but not beyond that liability. His liability over can not exceed his original liability in amount.[2]

In Consolidated &c. Co. v. Bradley (Mass.),[3] one Tierney, while employed by the plaintiff, had been instantly killed by an electric shock, due to the electric appliances on plaintiff's premises being out of repair and defective to the knowledge of the defendant, who had agreed with the plaintiff to furnish electricity by suitable appliances for the purpose of lighting the premises occupied by the plaintiff, and to keep the appliances in safe

[1] City of Rochester v. Campbell, 123 N. Y. 405; 25 N. E. 937; 20 Am. St. 760; 10 L. R. A. 393. In this case Chief Justice Ruger, for the court, says (page 413): "It is, therefore, essential in this case for the plaintiff to establish the original liability of the defendant's testator for the injuries inflicted to the party injured, and if it fails to do this, it must necessarily fail in the action."

[2] City of Holyoke v. Hadley Water-Power Co., 174 Mass. 424, 428; 54 N. E. 889; City of Rochester v. Campbell, 123 N. Y. 405; 25 N. E. 937; 20 Am. St. 760; 10 L. R. A. 393; Inhabitants &c. v. Boston &c. R. Co., 23 Pick. (Mass.) 24; 34 Am. D. 33.

[3] 171 Mass. 127; 50 N. E. 464; 68 Am. St. 409.

condition. It was held that the plaintiff could not recover over against this defendant the damages which it had paid Tierney's next of kin under the Employers' Liability Act, but the court intimated that the plaintiff had some remedy against the defendant for breach of contract, or for negligence on the part of the defendant.[1] The law as it then stood did not make a non-employer liable for negligence resulting in instantaneous death.[2] Since this case arose, the Massachusetts statute of 1898, ch. 565, has been enacted, which renders persons and corporations liable in damages not exceeding $5,000, nor less than $500, for negligence resulting in the death of persons not in their employ; and authorizes the executor or administrator of the deceased person to bring an action of tort within one year from the injury. If this statute had been in force, the defendant in Consolidated &c. Co. v. Bradley would have been liable to the personal representative of Tierney, and therefore it seems that he would have been liable over to this plaintiff to the extent of his liability to Tierney's executor or administrator, on the principle of subrogation.

With respect to employer and employee, the better view seems to be that the employer's right to recover over from his vendor of the defective article does not necessarily depend upon the injured employee's right to recover from the vendor. There are cases holding that the employee can not recover from the manufacturer and vendor because no privity of contract exists between them,[3] but this fact is not enti-

[1] Per Field, C. J., for the court on page 135, citing Old Colony R. Co. v. Slavens, 148 Mass. 363; 19 N. E. 372; 12 Am. St. 558, and Toomey v. Donovan, 158 Mass. 232; 33 N. E. 396.

[2] Kearney v. Boston &c. R. Co., 9 Cush. (Mass.) 108; Moran v. Hollings, 125 Mass. 93.

[3] McCaffrey v. Mossberg &c. Mfg. Co., 23 R. I. —; 50 Atl. 651; 55 L. R. A. 822 (1901); Heizer v. Kingsland &c. Mfg. Co., 110 Mo. 605; 19 S. W. 630; 33 Am. St. 482; 15 L. R. A. 821 (1892); Losee v. Clute, 51 N. Y. 494; 10 Am. R. 638; Caledonian R. Co. v. Mulholland, (1898)

tled to any weight in deciding whether or not the employer is entitled to recover over from the manufacturing vendor, whose negligence has damaged him by placing him under a legal liability to his injured employee, because privity of contract does exist between these parties.

In McCaffrey v. Mossberg &c. Mfg. Co. (R. I.), just cited, the manufacturer of a drop-press was sued for personal injuries occasioned to an employee of the purchaser by its breaking. The declaration alleged negligence in construction, but did not allege fraud or concealment, or facts showing an implied invitation to the employee to use the machine. The machine was not noxious or inherently dangerous. It was held on demurrer that the action could not be maintained for negligence on the part of the defendant, without privity of contract between the plaintiff and defendant.

If the employer's right to recover over depended solely upon being subrogated to the rights of his injured employee, it would follow in this class of cases that the employer could not recover over against the manufacturer, however negligent the latter had been in making and selling the article to the employer.

§ 37. Constitutionality of statutes limiting right to recover over.—A state legislature has the power to change, modify or abrogate the doctrine of subrogation, with respect to past contracts as well as with respect to future contracts of insurance. Massachusetts and Maine have statutes providing that railroad companies, if held liable in damages for fire communicated by their locomotive-engines, shall be entitled to the benefit of any insurance effected on the property by the owner, and that any money received as insurance shall be deducted from the

A. C. 216. But see Hayes v. Philadelphia &c. Co., 150 Mass. 457; 23 N. E. 225 (1890); Moynihan v. Kings &c. Co., 168 Mass. 450; 47 N. E. 425 (1897); Elliott v. Hall, 15 Q. B. D. 315; Glenn v. Winters, 40 N. Y. Supp. 659 (1896).

damages, if recovered before they are assessed, and if not so recovered, the policy of insurance shall be assigned to the corporation which is held liable in damages, and it may maintain an action thereon.[1]

The effect of these statutes is to prevent a fire-insurance company from recovering over against a railroad company damages which it has been obliged to pay to the property-owner by reason of the negligence of the railroad company in causing the fire. Upon policies issued after the passage of such statutes the insurance company can protect itself by demanding a higher premium to cover the additional risk. But upon policies issued before the passage of such statutes, when the insurance company possessed the right to recover over from the negligent railroad company the full amount of the policy, the insurance company is without redress, if the statutes are constitutional, as it can not either increase the rate or revoke the contract.

In the absence of such a statute, the wrong-doer would be liable for the whole damage, notwithstanding the fact that the injured person had previously received money on account of his injuries from an insurance company.[2]

The constitutional question has been decided recently in Maine and in Massachusetts. In the former state the supreme court was unanimous in favor of the validity of the statute, even as applied to pre-existing contracts. In the latter state the supreme court stood four to three in favor of its constitutionality, with a strong dissenting opinion by Mr. Justice Loring, in which Chief Justice Holmes and Mr. Justice Hammond concurred.

In these cases it was held that the obligation of prior

[1] Mass. Rev. Laws 1902, ch. 111, § 270; St. 1895, ch. 293.

[2] Althorf v. Wolfe, 22 N. Y. 355 (1860); Harding v. Townshend Tp., 43 Vt. 536; 5 Am. R. 304 (1871); Propeller Monticello v. Mollison, 17 How. 152; Clark v. Inhabitants &c., 2 B. & C. 254.

contracts of insurance which were made at a time when the liability of the railroad company was unlimited, was not impaired by such statutes, and that the statutes were constitutional.[1] Such a statute applies to contracts of insurance made before the passage of the statute and to damage by fire suffered after its passage. It is not retrospective. The rights of the insured under the policy are not impaired by the statute. They are as great as before the enactment of the law. It is merely the right of the insurance company to recover over against the railroad company which is lessened by the statute.

The doctrine of subrogation is founded, not upon the contract, but upon the relation of the parties and upon equitable considerations.[2] "The party subrogated acquires no greater rights than those of the party for whom he is substituted."[3]

The fact that an insurance policy provides in terms that the insurance company shall be subrogated to the rights of the insured against third persons whose negligence causes damage to the insured, gives the insurance company no greater rights against third persons than it would have without such a clause in the policy. Its only effect is to prevent the assured from releasing any claim that he has against the negligent person.[4]

§ 38. Employee's right to insurance fund payable to bankrupt employer.—When an employer is insured against

[1] Leavitt v. Canadian Pac. R. Co., 90 Me. 153; 37 Atl. 886; 38 L. R. A. 152 (1897); Lyons v. Boston &c. R. Co., 181 Mass. —; 64 N. E. 404 (1902).

[2] Leavitt v. Canadian Pac. R. Co., 90 Me. 153; 37 Atl. 886; 38 L. R. A. 152 (1897); Kernochan v. New York &c. Ins. Co., 17 N. Y. 428; Phoenix Ins. Co. v. Erie &c. Transportation Co., 117 U. S. 312; 6 S. Ct. 750, 1176; Simpson v. Thompson, 3 App. Cas. 279 (1877).

[3] Jackson Co. v. Boylston &c. Ins. Co., 139 Mass. 508; 2 N. E. 103; 52 Am. R. 728.

[4] Leavitt v. Canadian Pac. R. Co., 90 Me. 153, 163; 37 Atl. 886; 38 L. R. A. 152 (1897).

liability for accident to his employees, and becomes bankrupt before satisfaction of a judgment recovered against him by an injured employee, a bill in equity may be maintained against the insurance company to compel it to pay the amount of the judgment directly to the employee, or so much of the judgment as it may owe under the terms of its policy.[1]

§ 39. Employer's remedy against liability insurance company.—An employer who is insured "against liability to his employees for accidents," who successfully defends a suit against him by an injured employee, may recover over from the insurance company all reasonable expenses and disbursements incurred in defending the employee's action; because the policy is to indemnify the employer, and it was the duty of the insurance company to take charge of the defense of the original action. Having refused to do this, it is liable over to the present plaintiff for the expenses incurred by him in doing what it was the defendant's duty to do.[2]

[1] Beacon Land Co. v. Travellers' Ins. Co., 61 N. J. Eq. 59; 47 Atl. 579 (1900); Royal Bank v. Commercial Bank, 7 App. Cas. 366. Contra: Ex parte Waring, 2 Glyn & J. 404.

[2] Cornell v. Travellers' Ins. Co., 73 N. Y. Supp. 341 (1901); Hoven v. Employers' &c. Corp., 93 Wis. 201; 67 N. W. 46; Anoka Lumber Co. v. Fidelity &c. Co., 63 Minn. 286; 65 N. W. 353; 30 L. R. A. 689.

CHAPTER II.

DEFECTS IN THE CONDITION OF THE WAYS, WORKS, ETC.

SECTION

40. Statutory provisions and preliminary remarks.
41. Personal negligence of employer—In general.
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43. Same—Massachusetts.
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47. General effect of this clause in Massachusetts.
48. Repairing defects in permanent ways, works, or machinery—New York rule.
49. General effect of this clause in Alabama.
50. Actual or presumptive knowledge of defect by defendant or his proper officers.
51. Inspectors of foreign cars.
52. Road-master and section foreman, and other persons.
53. Defect must be proximate cause of injury.
54. Injury to the person himself entrusted with the duty of seeing that ways, etc., are in proper condition.
55. Accidental and temporary obstruction.
56. Momentary dangers and transitory defects in the ways, works, or machinery arising from negligence of superintendents, etc.
57. Proper appliances within reach.
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59. Concealed danger, or trap.
60. Injury not caused by defect alleged.
61. Machinery need not be the safest or best known in use.
62. Absence of guards, cleats, rails, etc.
63. Same.
64. Unsuitableness of ways, works, or machinery.
65. Miscellaneous cases.
66. Dangerous method of doing work as a defect in the ways, works, or machinery.

§ 40. Statutory provisions and preliminary remarks.—The first section of the Massachusetts act of 1887, ch. 270,[1] gives an employee a right of action against an employer when he is injured—

"(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the

[1] Rev. Laws 1902, ch. 106, § 71.

business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition."

The statutes of England, of Alabama, of New York, of Colorado, and of Indiana, all contain like provisions upon this subject.

This clause in the Massachusetts statute is chiefly declaratory of common-law principles. Prior to the passage of the act, it was there regarded as part of the employer's duty to use ordinary care in providing suitable ways, works, machinery, and plant for carrying on the work, and he could not escape liability to an employee who was injured by a defect therein by delegating the performance of this duty to another employee.[1]

The common law of England was different from that of Massachusetts upon this point. In England, before the passage of the act, the employer was not liable for injury to his employee caused by the negligence of a fellow servant who had been entrusted by the master with this duty.[2] But since the passage of the act the employer is liable for an injury so caused, and, as the right of action is there merely statutory, the employee must comply with the terms and conditions of the statute.[3]

[1] Snow v. Housatonic R. Co., 8 Allen (Mass.) 441; 85 Am. D. 720; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433; 40 Am. D. 210; Lawless v. Connecticut River R. Co., 136 Mass. 1; Ryalls v. Mechanics' Mills, 150 Mass. 190; 22 N. E. 766; 5 L. R. A. 667. See also, Hough v. Railway Co., 100 U. S. 213; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 359; 14 S. Ct. 140; Mullan v. Philadelphia &c. Steamship Co., 78 Pa. St. 25; 21 Am. R. 2; Shanny v. Androscoggin Mills, 66 Me. 420; Ashman v. Flint &c. R. Co., 90 Mich. 567; 51 N. W. 645.

[2] Wilson v. Merry, L. R. 1 Sc. App. 326.

[3] Griffiths v. Dudley, 9 Q. B. D. 357; Morrison v. Baird, 10 Ct. of Sess. Cas. (4th series) 271; Yarmouth v. France, 19 Q. B. D. 647.

It is an essential part of the plaintiff's case to prove a defect in the condition of such ways, works, machinery, or plant; and if he fails to do so, he can not recover under this clause of the statute.[1]

The questions considered in this chapter are:

(1) What is "negligence of the employer" within the meaning of this clause?

(2) What is a "defect in the condition of the ways, works, or machinery"?

(3) Who is a "person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition"?

(4) What constitutes negligence on the part of such person, for which the common employer is liable in damages to the injured employee?

§ 41. Personal negligence of employer—In general.—The various Employers' Liability Acts render the employer liable for his personal negligence in relation to defects in the condition of the ways, works, or machinery used in his business. There are certain personal duties which the employer owes to his employees, and the employer can not escape liability for neglect to perform these duties in person, nor by assuming the corporate form under a charter granted by the state. This was the rule at common law, and the statutes in question are merely declaratory of the common-law rule. The injured employee now has his choice, and may sue either at common law, or under the Employers' Liability Act, if his injury was occasioned by

[1] Louisville &c. R. Co. v. Binion, 98 Ala. 570, 575; 14 So. 619. Under the clauses relating to the negligence of a superintendent, or of a person in charge or control of a signal, switch, locomotive, engine, or train, it is not necessary to prove a defect in the condition of the ways, works, machinery, or plant. A superintendent's negligence may also consist in allowing a defect to arise or to continue in existence: Seaboard Mfg. Co. v. Woodson, 94 Ala. 143; 10 So. 87.

such personal negligence of the employer. These principles relate to permanent, but not to transitory, conditions. It is a continuing duty which rests upon the employer at all times

The decisions at common law in the states having Employers' Liability Acts are therefore important as showing what duties are or are not personal to the employer. The plaintiff may, if he chooses, sue under the Employers' Liability Act even when he has a right of action at common law. If his declaration counts upon the act he is bound by the terms of the act as to notice and the amount of damages, etc.[1] Generally speaking, when the plaintiff can establish personal negligence on the part of his employer, it is better for him to frame his declaration on the common-law liability than on the statutory liability. In New York, however, when the defense relies upon contributory negligence or assumption of risk by the plaintiff, arising out of his "continuance in the same place and course of employment with knowledge of the risk of injury,"[2] there may be some advantage in counting upon the statute, because the statute makes this a question of fact, and deprives the court of the power frequently exercised in actions at common law of ordering a verdict for the defendant on the ground that such conduct on the plaintiff's part constitutes an assumption of risk or contributory negligence as matter of law. Some of the New York cases at common law, where this question has been held to be one of law for the court and not one of fact for the jury, are cited in the foot-note.[3]

[1] Ryalls v. Mechanics' Mills, 150 Mass. 190, 196; 22 N. E. 766; 5 L. R. A. 667 (1889); Goodhue v. Dix, 2 Gray (Mass.) 181, as explained in Reynolds v. Hanrahan, 100 Mass. 313, 315.

[2] N. Y. acts 1902, ch. 600, § 3.

[3] Kennedy v. Friederich, 168 N. Y. 379; 61 N. E. 642 (1901) (falling into temporary elevator-shaft); Hannigan v. Lehigh &c. R. Co., 157 N. Y. 244; 51 N. E. 992 (1898) (coupling cars without deadwoods); Kennedy v. Manhattan R. Co., 145 N. Y. 288; 39 N. E. 956 (1895) (falling

In England before the passage of the act of 1880 there were very few duties which the employer could not delegate to subordinates, so as to avoid liability to employees.[1] In the United States the rules in the several states were more favorable to the employees, but considerable difference existed among the state courts.

In England, although an employee could recover for an injury occasioned by the personal negligence of the employer before the passage of the Employers' Liability Act, the distinction was closely drawn between an act performed by the employer himself and an act performed by his superintendent, or other superior servant. Thus in Roberts v. Smith,[2] a bricklayer in the defendant's employ was injured by the fall of a staging upon which he was standing at work. The staging was constructed under the direct supervision of the defendant by a coemployee. The putlogs used in the staging were in bad condition and the laborer who was making it broke several in trying them. The defendant told him to break no more, and that they would do very well. The laborer then used what he thought sound, and one of the putlogs broke and caused the staging to fall. It was held by the exchequer chamber that there was evidence for the jury of the defendant's personal negligence, and that a nonsuit was improperly directed. If this act had been an act of any coemployee the defendant would not have been liable and a nonsuit should have been directed.[3]

through unplanked hole between the tracks in a railway-yard); Sisco v. Lehigh &c. R. Co., 145 N. Y. 296; 39 N. E. 958 (1895) (mail-crane near railroad-track). The wording of the N. Y. act of 1902, ch. 600, § 3, leaves the matter in doubt as to whether this clause applies to common-law actions, or only to actions brought under the Employers' Liability Act.

[1] See Wilson v. Merry, L. R. 1 Sc. App. 326; Feltham v. England, L. R. 2 Q. B. 33.

[2] 2 H. & N. 213 (1857).

[3] Tarrant v. Webb, 18 C. B. 797.

In the leading case of Wilson v. Merry,[1] it was said by Lord Chancellor Cairns (p. 332):

"But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer in the employment of the master, the master is, in my opinion, not liable, although the two workmen can not technically be described as fellow workmen. As was said in the case of Tarrant v. Webb,[2] negligence can not exist if the master does his best to employ competent persons; he can not warrant the competency of his servants."

When the employer is a corporation, it is under a like personal obligation to exercise due care in providing machinery, tools and appliances and keeping them in repair, and in providing a safe place in which its employees may work, and in hiring competent servants. Liability for negligence in these matters can not be avoided, either by the corporate or individual employer, by delegating these duties to superintendents or managers or others, however competent they may be. Although the different states differ somewhat as to what duties are personal to the employer, they all agree that a personal duty can not be delegated to a coemployee of the plaintiff so as to relieve the common employer of liability for negligence.[3]

[1] L. R. 1 Sc. App. 326.

[2] 25 L. J. (N. S.) C. P. 263.

[3] Pantzar v. Tilly Foster Iron &c. Co., 99 N. Y. 368; 2 N. E. 24 (1885); Keegan v. Western R. Corp., 8 N. Y. 175; 59 Am. D. 476; Ryan v.

The duty to instruct young and inexperienced employees and to warn them of dangers is also cast upon the employer by the common law.[1]

§ 42. Same—Indiana.—In Indiana and some other jurisdictions a like result is reached by applying the doctrine of vice-principal. When the plaintiff is injured by the negligence of a coemployee who performs the master's personal duties, it is said that the negligent employee is not a fellow servant but a vice-principal, or representative, and the common employer is liable.[2]

Thus in a recent Indiana case it was held that a train-dispatcher is not a fellow servant with trainmen in the employ of the same railroad company, but is a vice-principal, for whose negligence the common employer is liable, because he is charged with the performance of duties which the railroad owes as master to its other servants.[3]

Fowler, 24 N. Y. 410; 82 Am. D. 315; Flike v. Boston &c. R. Co., 53 N. Y. 549; 13 Am. R. 545 (1873); McGovern v. Central Vermont R. Co., 123 N. Y. 280; 25 N. E. 373 (1890); Hankins v. New York &c. R. Co., 142 N. Y. 416; 37 N. E. 466; 40 Am. St. 616; 25 L. R. A. 396 (1894); Redington v. New York &c. R. Co., 84 Hun (N. Y.) 231; 152 N. Y. 655; 47 N. E. 1111; Haskell v. Cape Ann Anchor Works, 178 Mass. 485; 59 N. E. 1113 (1901); Arkerson v. Dennison, 117 Mass. 407; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433; 90 Am. D. 210 (drunken switchman); Hall v. Bedford Quarries Co., 156 Ind. 460; 60 N. E. 149 (incompetent employee); Baltimore &c. R. Co. v. Amos, 20 Ind. App. 378; 49 N. E. 854; Darrigan v. New York &c. R. Co., 52 Conn. 285, 305; 52 Am. R. 590 (1884) (criticizing the Massachusetts rule at common law as confining "the liability of employers within too narrow limits").

[1] Jarvis v. Coes Wrench Co., 177 Mass. 170; 58 N. E. 587 (circular saw); Coombs v. New Bedford Cordage Co., 102 Mass. 572; 3 Am. R. 506; Wheeler v. Wason Mfg. Co., 135 Mass. 294; Flike v. Boston &c. R. Co., 53 N. Y. 549; 13 Am. R. 545; Paulmier v. Erie R. Co., 34 N. J. L. 151; Williams v. Clough, 27 L. J. (N. S.) Ex. 325.

[2] Louisville &c. R. Co. v. Heck, 151 Ind. 292; 50 N. E. 988 (1898); Darrigan v. New York &c. R. Co., 52 Conn. 285; 52 Am. R. 590 (1884); Chicago &c. R. Co. v. Ross, 112 U. S. 377; 5 S. Ct. 184 (1884); Chicago &c. R. Co. v. McLallen, 84 Ill. 109 (1876); Hun v. Michigan Cent. &c. R. Co., 78 Mich. 513; Lewis v. Seifert, 116 Pa. St. 628; 11 Atl. 514.

[3] Louisville &c. R. Co. v. Heck, 151 Ind. 292; 50 N. E. 988 (1898).

In Sievers v. Peters Box &c. Co. (Ind.),[1] it was decided that an employee who is authorized to buy materials and construct an elevator for use in his employer's business is a vice-principal with respect to employees entitled to use the elevator, and, if it be negligently constructed and injury happens thereby, to an employee, the employer is liable;[2] but it was further held that ordinary employees are not entitled to ride up or down on a freight-elevator the first day it is put in operation, and if they do so, they assume the risk.[3]

§ 43. Same—Massachusetts.—In Massachusetts, substantially a like result is reached by saying that the employer owes certain duties to his employees, the performance of which duties can not be delegated so as to avoid liability; and if they be delegated and negligently performed by a fellow servant, the common employer is held liable to the injured employee, without invoking the vice-principal doctrine.

At common law the employer was also bound to use ordinary care to provide proper employees to carry on the business, and could not delegate the performance of this duty to any one else. If he was negligent in this respect, either in procuring or in keeping incompetent employees in his service, and injury resulted to an employee by reason of such incompetency, the employer was liable in damages.[4]

[1] 151 Ind. 642, 654, 655; 50 N. E. 877; 52 N. E. 399.

[2] Citing Indiana &c. R. Co. v. Snyder, 140 Ind. 647; 39 N. E. 912.

[3] See also, Morris v. Brown, 111 N. Y. 318; 18 N. E. 722; Hochmann v. Moss Engraving Co., 23 N. Y. Supp. 787; 4 Misc. (N. Y.) 160.

[4] McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433; 90 Am. D. 210; Keith v. New Haven &c. R. Co., 140 Mass. 175; 3 N. E. 28; Olsen v. Andrews, 168 Mass. 261; 47 N. E. 90 (1897). See also, Wabash R. Co. v. McDaniels, 107 U. S. 454; 2 S. Ct. 932; Whittaker v. President &c., 126 N. Y. 544; 27 N. E. 1042; Baulec v. New York &c. R. Co., 59 N. Y. 356; 17 Am. R. 325; Hilts v.

Thus, in Gilman v. Eastern R. Co. (Mass.),[1] a railroad company was held liable to one of its car-repairers for retaining in its employ an habitual drunkard as a switchman, whose negligence in failing properly to adjust a switch caused the plaintiff's injury, after it knew, or by the use of due care might have known, that he was a drunkard.

So, a railroad company is liable to a brakeman in its employ for an injury caused by a worm-eaten and rotten stake used to hold railroad-ties upon a platform-car, and to facilitate the passage of brakemen from car to car; and the facts that the stake was prepared by fellow workmen, and that the defendant supplied sufficient good lumber for the purpose, will not relieve the defendant from liability at common law.[2]

In Spicer v. South Boston Iron Co. (Mass.),[3] the plaintiff, while in the employ of the defendant, was injured by the breaking of an iron hook, and there was evidence that the hook had a visible flaw or crack in it, which a careful inspection would have revealed. It was held in an action at common law that there was sufficient evidence of negligence on the part of the defendant to support a verdict for the plaintiff.

"The general duty to provide a place for the plaintiff which was reasonably safe," says Mr. Justice Knowlton, "having reference to the kind of business in which the defendant was engaged, was so far personal to himself as a master that he could not escape responsibility by delegating it to another.[4]

Chicago &c. R. Co., 55 Mich. 437; 21 N. W. 878; Lawler v. Androscoggin R. Co., 62 Me. 463.

[1] 13 Allen (Mass.) 433; 90 Am. D. 210.

[2] McIntyre v. Boston &c. R. Co., 163 Mass. 189; 39 N. E. 1012.

[3] 138 Mass. 426. See also, Jones v. Pacific Mills, 176 Mass. 354; 57 N. E. 663 (1900); Rice v. King Philip Mills, 144 Mass. 229; 11 N. E. 101 (1887); Connors v. Durite Mfg. Co., 156 Mass. 163; 30 N. E. 559 (1892).

[4] Citing Toy v. United States Cartridge Co., 159 Mass. 313; 34 N. E. 461.

While the plaintiff assumed the obvious risks of the business, he did not assume the risk from the failure of the defendant, either personally or through a superintendent, to perform the ordinary duties of an employer in providing against unnecessary or concealed dangers in places in which laborers were set to work. The jury were rightly permitted to pass upon the question whether the defendant was negligent in this particular."[1]

§ 44. Same—New York.—"For his own negligence," says Mr. Justice Andrews, "the master is responsible to his servant equally as to any other person. The servant on entering the employment of the master does not assume the risk of the master's negligence. He assumes the risk of the negligence of a coservant; but the reason of the rule, which exempts the master from liability to one servant for the negligence of another, ceases, and has no application when the master's own negligence caused the injury."[2]

The doctrine is clear and well settled, but the difficulty arises in applying it to the facts of particular cases. Especially in the matter of negligent orders given by a competent coemployee of the plaintiff, its application is attended with difficulty. "The boundary line between an act of the master and an act of the employee is sometimes quite vague and shadowy."[3]

In New York it has been held: That a railroad corporation owes a personal duty to its employees to see that

[1] Hopkins v. O'Leary, 176 Mass. 258, 264; 57 N. E. 342; citing Rogers v. Ludlow Mfg. Co., 144 Mass. 198, 205; 11 N. E. 77; Neveu v. Sears, 155 Mass. 303; 29 N. E. 472; O'Driscoll v. Faxon, 156 Mass. 527; 31 N. E. 685; Coan v. City of Marlborough, 164 Mass. 206; 41 N. E. 238; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. 501; Dean v. Smith, 169 Mass. 569; 48 N. E. 619.

[2] Booth v. Boston &c. R. Co., 73 N. Y. 38, 40; 29 Am. R. 207.

[3] Hankins v. New York &c. R. Co., 142 N. Y. 416, 421; 37 N. E. 466; 40 Am. St. 616; 25 L. R. A. 396, per Peckham, J.

there are a sufficient number of brakemen upon a train when it starts.[1]

That a railroad company owes a duty as master to give correct orders in dispatching trains, or at least to take due and reasonable care to give correct orders in this matter, and that a failure to perform that duty is the failure of the master in his character as such, although its performance was delegated to a competent train-dispatcher.[2]

That proper inspection of the equipment and machinery of a train is the employer's duty with respect to railroad employees;[3] and

That if an employer is negligent with respect to a personal duty, the fact that the negligence of a coemployee contributes to the plaintiff's injury does not relieve the common employer from liability.[4]

It is the personal duty of the employer in New York:

(1) To exercise reasonable care in furnishing adequate and suitable tools and implements and machinery for the work, and to keep them in repair.[5]

(2) To furnish a reasonably safe place in which to work.[6]

(3) To use reasonable care in selecting and in retaining in its service only competent workmen.[7]

(4) To make and promulgate proper rules and regula-

[1] Flike v. Boston &c. R. Co., 53 N. Y. 551, 554; 13 Am. R. 545; Booth v. Boston &c. R. Co., 73 N. Y. 38; 29 Am. R. 97.

[2] Hankins v. New York &c. R. Co., 142 N. Y. 416; 37 N. E. 466; 40 Am. St. 616; 25 L. R. A. 396.

[3] Bailey v. Rome &c. R. Co., 139 N. Y. 302; 34 N. E. 918.

[4] Booth v. Boston &c. R. Co., 73 N. Y. 38; 29 Am. R. 97 (1878); Fuller v. Jewett, 80 N. Y. 46; 36 Am. R. 575 (1880).

[5] Fuller v. Jewett, 80 N. Y. 46; 36 Am. R. 575 (1880).

[6] McGovern v. Central Vermont R. Co., 123 N. Y. 280; 25 N. E. 373 (1890); Pantzar v. Tilly Foster Iron &c. Co., 99 N. Y. 368; 2 N. E. 24 (1885).

[7] Whittaker v. President &c., 126 N. Y. 544; 27 N. E. 1042 (1891); Mann v. President &c., 91 N. Y. 495 (1883); Laning v. New York Central R. Co., 49 N. Y. 521.

the personal care of the employer in selecting or retaining him does not defeat the right of recovery.

In Conrad v. Gray (Ala.)[1] it was ruled that a single act of negligence is not sufficient to prove an employee to be incompetent, so as to charge an employer in an action brought by a coemployee injured by his negligence.[2]

§ 47. General effect of this clause in Massachusetts.— The "condition" of the ways, etc., with regard to the safety of the employees is what the statute refers to, and not the condition with regard to performing the work in question. Hence a defect in the condition means a defect which renders the ways, works, or machinery unsafe for the employees, and not a defect which interferes with the working capacity.[3] The test is not the capacity of the thing to do the work for which it was intended, but to allow the employees to do their work in reasonable safety.

This provision made very little if any enlargement to the rights of an employee as they existed at common law in Massachusetts. It is chiefly a legislative declaration of common-law principles. In Ryalls v. Mechanics' Mills (Mass.),[4] Mr. Justice Holmes, speaking for the court, says: "In 1887 [before the passage of the act] it was settled law in Massachusetts that masters were personally bound to see that reasonable care was used to provide reasonably safe and proper machinery, so that, if the duty was entrusted to another and was not performed, the fact that the proximate cause of the damage was the negligence of a fellow servant was no defense.[5] The rule in Wilson v.

[1] 109 Ala. 130; 19 So. 398 (1896).

[2] See also, Harvey v. New York Central &c. R. Co., 88 N. Y. 481 (1882); Baltimore Elevator Co. v. Neal, 65 Md. 438; Couch v. Coal Co., 46 Iowa 17.

[3] Willey v. Boston Electric Light Co., 168 Mass. 40; 46 N. E. 395; 37 L. R. A. 723.

[4] 150 Mass. 190, 194; 22 N. E. 766; 5 L. R. A. 667.

[5] Citing Gilman v. Eastern R. Co., 13 Allen (Mass.) 433, 440; 90 Am.

Merry[1] practically, if not in terms, had been modified very much in favor of servants."[2]

This duty of the employer was not, by the common law of Massachusetts, confined strictly to machinery, but also extended to all appliances and instrumentalities connected with his business. In Snow v. Housatonic R. Co. (Mass.),[3] it was held that a railroad corporation was liable at common law to one of its employees for an injury caused by a want of repair in the road-bed of the railroad. The employer could not escape liability by delegating this duty to some one else, and was liable for its non-performance to every employee who was not himself negligent.

In Littlefield v. Edward P. Allis Co. (Mass.),[4] the plaintiff's eye was injured by the breaking and flying of a piece of piping which was used as a buffer to receive the blow and protect the heads of bolts which were being driven into the hubs of a fly-wheel by a dolly-bar. It appeared that such iron piping was much more brittle and more liable to fly than a piece of wrought iron. The jury returned a verdict for the plaintiff on a common-law count alleging negligence of the defendant in not providing safe and suitable tools, materials and appliances for the work in which the plaintiff and those with him were engaged. The piping was used by order of one Maynard, who had charge of the work for the defendant, and it was held that Maynard's act in ordering the piece of pipe to be used as a buffer must be deemed to have been the act of the defendant because this was a duty which belonged to the defendant personally and could not be delegated so as to

D. 210; and Lawless v. Connecticut River R. Co., 136 Mass. 1. See also, Toy v. United States Cartridge Co., 159 Mass. 313; 34 N. E. 461.

[1] L. R. 1 Sc. App. 326.

[2] Citing Rogers v. Ludlow Mfg. Co., 144 Mass. 198, 202; 11 N. E. 77.

[3] 8 Allen (Mass.) 441; 85 Am. D. 720.

[4] 177 Mass. 151; 58 N. E. 692. See also, Kleibaz v. Middleton Paper Co., 180 Mass. 363; 62 N. E. 371 (1902).

avoid liability. It was therefore held that the verdict for the plaintiff was justified by the evidence, because Maynard's act justified the jury in finding that he was negligent.[1] It was further held in the same case that the plaintiff did not assume the risk of such an injury.[2]

Neither at common law nor under the Employers' Liability Act is an employer liable to his employee for an injury which is the result of a pure accident, which could not have been guarded against by reasonable care.[3]

In Slattery v. Walker & Pratt Mfg. Co. (Mass.),[4] the plaintiff, a molder, was injured by reason of the negligence of the defendant's assistant superintendent, who undertook to improve an air-hoist operated by the plaintiff, by taking out a half-inch check-valve and inserting a three-quarter-inch check-valve. The assistant superintendent was in charge of the mechanical department of the defendant's foundry, but he had received no orders to make this alteration in the hoist. The new check-valve proved to be insufficiently strong to stand the air-pressure inside the hoist, and split, and occasioned the injury. It was held in an action at common law that the defendant was liable.

But an employer is not liable for the negligence of an employee in making or in failing to make ordinary repairs required from day to day.[5]

The above rules of the common law are still in force in Massachusetts, for the Employers' Liability Act does not

[1] See also, McIntyre v. Boston &c. R. Co., 163 Mass. 189; 39 N. E. 1012; Twomey v. Swift, 163 Mass. 273; 39 N. E. 1018.

[2] See upon this question: Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155; 29 N. E. 464; Austin v. Fitchburg R. Co., 172 Mass. 484; 52 N. E. 527; Spaulding v. Forbes Lith. Mfg. Co., 171 Mass. 271; 50 N. E. 543; 68 Am. St. 424.

[3] Craven v. Mayers, 165 Mass. 271; 42 N. E. 1131.

[4] 179 Mass. 307; 60 N. E. 782 (1901).

[5] Johnson v. Boston Towboat Co., 135 Mass. 209 (1883); Wosbigian v. Washburn &c. Mfg. Co., 167 Mass. 20; 44 N. E. 1058 (1896); McGee v, Boston Cordage Co., 139 Mass. 445; 1 N. E. 745 (1885).

repeal or restrict them, but on the contrary it enlarges and increases in certain directions the rights of employees and the liabilities of employers.

§ 48. Repairing defects in permanent ways, works, or machinery—New York rule.—The common-law rule upon this subject in New York seems to be less favorable to the employee than that of Massachusetts, and consequently the Employers' Liability Act of 1902 has made more change in the rights and liabilities of the parties in New York than in Massachusetts. The English rule, as laid down in Wilson v. Merry,[1] was more nearly followed in New York, and some of the cases go to the extent of relieving the employer from liability for defects in the condition of the permanent parts of his ways, works or machinery, unless he has been personally negligent with respect to them.[2]

In Schulz v. Rohe (N. Y.),[3] the plaintiff was injured while operating a sausage-stuffing machine, which the defendant's foreman knew to be in a defective condition, and had ordered the engineer to repair. The engineer was employed for the purpose of keeping the machines in proper condition, and his failure or neglect to repair the machine in question was the proximate cause of the plaintiff's injury.[4] It was held that the engineer and the plaintiff were coservants and that the defendant was not liable in this action at common law. Under the New York Employers' Liability Act it would seem that the engineer would be a person entrusted with "the duty of seeing that the ways, works, or machinery were in proper

[1] L. R. 1 Sc. App. 326.

[2] Warner v. Erie &c. R. Co., 39 N. Y. 468 (1868); Malone v. Hathaway, 64 N. Y. 5, 9 (1876); Wright v. New York Central R. Co., 25 N. Y. 562 (1862); Ryan v. Fowler, 24 N. Y. 410; 82 Am. D. 315 (1862); Keegan v. Western R. Corp., 8 N. Y. 175; 59 Am. D. 476 (1853).

[3] 149 N. Y. 132; 43 N. E. 420 (1896).

[4] It was further held in this case that the plaintiff was guilty of contributory negligence.

condition," within the meaning of section 1, clause 1, for whose negligence the employer would be liable.

In other New York cases, however, it was held in common-law actions, especially against corporations, where the doctrine of personal negligence was not strictly applicable, that the employer could not avoid liability for defects in the condition of the ways, works or machinery, by delegating the duty of repairing them to a coemployee of the injured employee.[1]

If the employer was liable at common law before the adoption of the Employers' Liability Act, he is liable now since the passage of that act. His liability has not been lessened in any respect, but has been extended in several respects. By section 5 of the New York act it is expressly declared:

"Section 5. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section 2 of this act be a bar to the maintenance of a suit upon any such existing right of action."

The common-law rule of fellow service was founded upon considerations of public policy.

Chief Justice Church, in Flike v. Boston &c. R. Co. (N. Y.),[2] remarked upon this subject of fellow service, as an exception to the rule respondeat superior: "The rule respondeat superior does not itself spring directly from principles of natural justice and equity, but has been established upon principles of expediency and public policy for the protection of the community; and in view of the unjust consequences which may ensue from its applica-

[1] Corcoran v. Holbrook, 59 N. Y. 517; 17 Am. R. 369 (1875); Crispin v. Babbitt, 81 N. Y. 516; 37 Am. R. 321 (1880); Besel v. New York Central R. Co., 70 N. Y. 171, 173 (1877).

[2] 53 N. Y. 549, 552; 13 Am. R. 545.

tion for injuries by coservants, the same principles of public policy demand its limitation, and while the general rule was demanded for the protection of the community, the exception is demanded for the protection of the employer."

§ 49. General effect of this clause in Alabama.—In Wilson v. Louisville &c. R. Co. (Ala.),[1] the court says by Mr. Justice Clopton: "Under the statute, negligence in causing or failing to discover or remedy a defect is essential to liability. It does not undertake to define what shall constitute a defect or negligence in regard to the condition of the ways, works, machinery, or plant. To determine these matters, reference must be made to the principles of the common law. Therefore, whether the plaintiff's right to recovery is based on the statutory or common-law liability of an employer, the measure of defendant's duty to plaintiff is essentially the same."

To justify a recovery under these statutes on the ground of a defect in the condition of the defendant's ways, works, machinery or plant, it is not sufficient for the plaintiff to show that a defect existed, and that it caused the injury: he must also prove that the defect arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person charged with that duty; and, in the absence of such proof, the judge should direct a verdict for the defendant.[2] In the Alabama case just cited a car-repairer alleged that his injury was caused by a defective brake on a railroad-car. While he was engaged in repairing a car which had been put on the repair-track for that purpose, and while he was under the car, another car, belonging to another railroad company, which car the defendant railroad was using, was run in upon the

[1] 85 Ala. 269, 272; 4 So. 701.

[2] Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552; O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 137; 32 N. E. 1119.

repair-track with such force as to drive a stationary car upon the car which the plaintiff was repairing, causing his injuries. The foreign car had a defective brake, which prevented its speed being checked in time to avoid the collision. It had been condemned to the repair-track on account of a defective wheel, no defect having been discovered in the brake prior to the accident. The jury returned a verdict in favor of the plaintiff for $15,000, upon which judgment was entered in the trial court.

In reversing this judgment, the supreme court says by Mr. Justice McClellan, on page 494: "There is evidence in this record that the brake was defective; but this testimony exhibits no tendency whatever to show that the defect was caused by the negligence of the defendant, or any employee, or had not been discovered or remedied because of any negligence on the part of the defendant or its employees. Without such evidence, no recovery could be had under that count, and the court should have so instructed the jury, as requested in the fourth charge asked by the defendant."[1]

§ 50. Actual or presumptive knowledge of defect by defendant or his proper officers.—At common law, an employee can not maintain an action against his employer for an injury caused by a defect in the ways, works, machinery or plant, unless the employer knew of the defect, or by the exercise of reasonable care might have known of the defect in time to remedy it before the accident.[2] But the circumstances may be such as to raise a presump-

[1] Citing Atchison &c. R. Co. v. Ledbetter, 34 Kan. 326; 8 Pac. 411; 21 Am. & Eng. R. Cas. 555.

[2] Reed v. Boston &c. R. Co., 164 Mass. 129; 41 N. E. 64; Nason v. West, 78 Me. 253; 3 Atl. 911; Griffiths v. London &c. Docks Co., 12 Q. B. D. 495; 13 Q. B. D. 259; Hayden v. Smithville Mfg. Co., 29 Conn. 548; Carruthers v. Chicago &c. R. Co., 55 Kan. 600; 40 Pac. 915; Atchison &c. R. Co. v. Wagner, 33 Kan. 660; 7 Pac. 204; Wright v. New York Central R. Co., 25 N. Y. 562, 566.

tion of knowledge on the part of the employer, and to relieve the plaintiff of the obligation of proving actual knowledge;[1] or they may be such as to charge the employer with negligence in failing to discover and remedy the defect.[2]

A like rule prevails in actions under the Employers' Liability Acts.

It has been held under the Alabama act that mere knowledge of a defect by the employer, or by the person entrusted with the duty of seeing that the ways, works, etc., were in proper condition, will not render the employer liable for an injury caused by such defect; it must further appear that a reasonable time had elapsed after the discovery of the defect and before the injury to make repairs, or to remedy the defect. Thus, in Seaboard Mfg. Co. v. Woodson (Ala.),[3] a fireman, while oiling and cleaning a locomotive-engine, was injured by a leaky throttle-valve of the engine, which caused it to start up while he was underneath it. One count of his declaration alleged that this defect was known to the superior officers of the plaintiff, and was known to the defendant, but failed to state how long before the injury the defect had been known to the defendant or to the plaintiff's superiors. It was held on demurrer that this count did not state a cause of action, for the reasons above stated. In delivering the opinion, Mr. Justice Walker says, on page 147: "Unless there had been a reasonable opportunity to effect a remedy, it could not be said that the failure to do so was negligent. The defendant must have had sufficient time to remedy the defect after its discovery before it could be chargeable with negligence in failing to effect

[1] Guthrie v. Maine Cent. R. Co., 81 Me. 572; 18 Atl. 295.

[2] Moynihan v. Hills Co., 146 Mass. 586; 16 N. E. 574; 4 Am. St. 448; Toy v. United States Cartridge Co., 159 Mass. 313; 34 N. E. 461; Cowan v. Chicago &c. R. Co., 80 Wis. 284; 50 N. W. 180.

[3] 94 Ala. 143; 10 So. 87; 98 Ala. 378; 11 So. 733.

such remedy. Mere knowledge, without the opportunity to act on it, would not constitute negligence."[1]

Under a like clause in the English act, it has been held that the only defects for which an employer is liable are such as imply negligence on his part, or of some one in his employ entrusted by him with the duty of seeing that the ways, works, machinery, or plant are in proper condition. Therefore, where the plaintiff, while working upon a carding-machine, had his thumb cut off by its slipping through a hole in the disk of the wheel, which kind of wheel was in common use, though there was another kind without holes, it was decided by the court of appeal, Lord Esher, M. R., dissenting, that the plaintiff could not recover, as the defect did not imply negligence.[2]

§ 51. Inspectors of foreign cars.—At common law in Massachusetts a car-inspector was considered a fellow servant with a brakeman, engineer, etc., and the railroad company was not liable to the others for his negligence in failing to discover a defect in a foreign car, which the defendant company was merely forwarding for another road and not using for its own benefit.[3] Under the Massachusetts Employers' Liability Act of 1887, however, a car-inspector is a person entrusted with the duty of seeing that the railroad's ways, works, or machinery are in proper condition.[4] As the amendatory act of 1893, ch. 359, provides that "a car in use by or in the possession of a railroad company shall be considered a part of the ways, works, or machinery of the company using or having the same in possession, within the meaning of this

[1] See also, United States Rolling Stock Co. v. Weir, 96 Ala. 396; 11 So. 436.

[2] Walsh v. Whiteley, 21 Q. B. D. 371.

[3] Mackin v. Boston &c. R. Co., 135 Mass. 201; 46 Am. R. 456. See also, Kelly v. Abbot, 63 Wis. 307; 23 N. W. 890; 53 Am. R. 292; Smith v. Potter, 46 Mich. 258; 9 N. W. 273; 41 Am. R. 161.

[4] Bowers v. Connecticut River R. Co., 162 Mass. 312; 38 N. E. 508.

act, whether such car is owned by it or by some other company or person," it follows that a railroad company is liable to one of its employees who is injured by the negligence of its car-inspector in failing properly to inspect a foreign car.[1]

Even under the act of 1887, before the passage of the act of 1893, a railroad company, which allowed a custom or habit to prevail of not inspecting foreign cars which came from a particular direction, was liable to an employee who was injured, by reason of such negligence, on a car which came from that direction and had not been inspected; for such custom or habit constitutes negligence either of the railroad company itself, or of its superintendent, or of some person in its service, in failing to provide proper inspection.[2] And at common law, where the inspector is incompetent, the defendant is liable to its injured employee though the car belongs to another road and the defendant is merely forwarding it.[3]

If the employer uses a foreign car for his own benefit, he is bound by the rule which requires him to furnish proper appliances, even in those states which hold the contrary when he merely forwards the foreign car without using it for his benefit.[4]

In Walsh v. New York &c. R. Co. (Mass.),[5] it was held that the jury was warranted in finding, on the evidence, that by the law of Connecticut, where the injury occurred, a railroad company is bound to see that foreign

[1] This statute of 1893 changes the rule of construction under the act of 1887, adopted in Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 L. R. A. 425, in which it was held that such a foreign car was not a part of the "ways, works, or machinery connected with or used in the business of the employer."

[2] Coffee v. New York &c. R. Co., 155 Mass. 21; 28 N. E. 1128.

[3] Keith v. New Haven &c. R. Co., 140 Mass. 175; 3 N. E. 28.

[4] Spaulding v. Flynt Granite Co., 159 Mass. 587; 34 N. E. 1134; Cowan v. Chicago &c. R. Co., 80 Wis. 284; 50 N. W. 180.

[5] 160 Mass. 571; 36 N. E. 584; 39 Am. St. 514.

cars are reasonably inspected, even if they are not used by the defendant; and that by the Connecticut law the railroad can not escape liability by delegating this duty to a competent inspector, but is liable for his negligence in failing to inspect. The jury having found such to be the law of Connecticut, the Massachusetts court held that the injured employee was entitled to recover damages in Massachusetts, although the common law of Massachusetts was the contrary.[1]

The competency of a car-inspector will be presumed until the contrary is shown, and an employee who is injured by the alleged negligence of an incompetent car-inspector in the employ of the same railroad company, must prove the incompetency.[2]

§ 52. Road-master and section foreman, and other persons.—A road-master and a section foreman of a railroad company are persons entrusted with the duty of seeing that the track is kept in good condition, and if they are negligent in failing to discover or remedy a defect in the track, by reason of which a locomotive is derailed and the engineer injured, the common employer is liable under the Employers' Liability Act.[3]

In Copithorne v. Hardy (Mass.)[4] the plaintiff, while in the employ of the defendant, and while sitting at work in the defendant's mill making pills, was injured by some heavy shafting falling upon her back. The shafting had been moved the day before the accident by a carpenter, named Maclaren, acting under the orders of the defendant's superintendent, named Shea. Maclaren was the man who understood the machinery and looked after it.

[1] Mackin v. Boston &c. R. Co., 135 Mass. 201; 46 Am. R. 456.

[2] Louisville &c. R. Co. v. Bates, 146 Ind. 564; 45 N. E. 108 (1897). (The opinion in this case discusses the duty to inspect foreign cars.)

[3] Kansas City &c. R. Co. v. Webb, 97 Ala. 157; 11 So. 888.

[4] 173 Mass. 400; 53 N. E. 915 (1899).

The shafting was attached to the ceiling of the room by hangers or brackets and screws. When the machinery was started on the morning of the accident it squeaked and was stopped, and Mr. Maclaren worked on it again for some time, but in the afternoon it fell and injured the plaintiff. The action was under the Employers' Liability Act for a defect in the defendant's ways, works and machinery. The plaintiff obtained a verdict in the superior court, and on the defendant's exceptions it was held that the carpenter was a person entrusted with the duty of seeing that the ways, works and machinery were in proper condition under section 1, clause 1, of the statute. This conclusion, however, was based largely upon the ground that the condition of the shafting was one of those permanent arrangements as to which the duty of the employer could not be delegated, as appears from the following on page 401 by Judge Holmes: "In the first place we think it entirely plain that the conditions of which the plaintiff complains do not belong to that transitory class for which the employer is not responsible beyond furnishing a choice of proper materials or instrumentalities to the plaintiff or her fellow servants. To put it at the lowest, the jury were warranted in finding, as it was left to them to find, that this was one of those permanent arrangements as to which the duty of the employer could not be delegated according to the well-known common-law distinction, or, under the statute, that if there was a defect it was a defect in the ways, works and machinery.[1] It does not matter that the shafting had been up only for a day. The defendant's liability was the same that it would have been a month later."

§ 53. Defect must be proximate cause of injury.—The Alabama decisions hold strictly to the rule that when the

[1] Prendible v. Connecticut River Mfg. Co., 160 Mass. 131; 35 N. E. 675.

plaintiff's cause of action is based upon a defect in the condition of his employer's ways, works, machinery, or plant, it must appear that such defect was the proximate and not the remote cause of the injury.[1]

In all the states, the plaintiff in an action for personal injuries based upon negligence can not recover damages unless the defendant's negligence was the proximate cause of his injury, though in some jurisdictions the rule is less strictly enforced than in Alabama.[2]

In Ashley v. Hart (Mass.),[3] the plaintiff and one K, both of whom were journeymen painters, were employed by the defendant to paint another person's house, and were furnished by the defendant with a hanging stage. K omitted to fasten his end of the stage securely, and while it was being lowered into position it fell and injured the plaintiff. In an action under the act it was held that the injury was not caused by a defect in the condition of the stage, but by the negligence of a fellow servant, and that the plaintiff could not recover.[4]

§ 54. Injury to the person himself entrusted with the duty of seeing that ways, etc., are in proper condition.— The person whose duty it is to see that his employer's ways, works or machinery are in proper condition can not recover damages for an injury caused by a defect in their condition, nor, in case the injury results in death,

[1] Tuck v. Louisville &c. R. Co., 98 Ala. 150; 12 So. 168; Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619.

[2] 1 Thompson Neg. (2d ed.), §§ 44 to 54, and cases cited; Stewart v. Ferguson, 34 App. Div. (N. Y.) 515; 54 N. Y. Supp. 615; Gibney v. State, 137 N. Y. 1; 33 N. E. 142; 19 L. R. A. 365; 33 Am. St. 690; Pittsburgh &c. R. Co. v. Conn, 104 Ind. 64; 3 N. E. 636; Central Union Tel. Co. v. Swoveland, 14 Ind. App. 341; 42 N. E. 1035; Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469.

[3] 147 Mass. 573; 18 N. E. 416; 1 L. R. A. 355.

[4] See also, Brady v. Ludlow Mfg. Co., 154 Mass. 468; 28 N. E. 901.

can his personal representative recover under the act.[1] In such case the proximate cause of the accident is the plaintiff's neglect of duty. In some cases the defense may be contributory negligence, in others assumption of the risk.

In Birmingham Furnace Co. v. Gross (Ala.),[2] a master mechanic, while repairing a tall chimney of a gas-furnace, was overcome by gas, fell off the ladder, and was killed. His administrator claimed that the failure to provide a scaffold or platform instead of a ladder was a defect in the condition of the ways, works, etc., for which the defendant was liable. But it further appeared that the deceased himself was the person entrusted with the duty of seeing that the ways, works, machinery, or plant were in proper condition, and it was accordingly held that the plaintiff could not recover, and that the presiding justice should have ordered a verdict for the defendant.

§ 55. Accidental and temporary obstruction.—The Employers' Liability Act does not make the employer liable for every accidental and temporary obstruction which arises in the progress of the work. This is not such a defect in the condition of his ways, works, or machinery as is contemplated by the statute. To give a right of action, the defect must be something in the permanent or quasi-permanent condition of the ways, works, or machinery.[3]

In O'Connor v. Neal, just cited, a pile of rubbish had collected on the floor of a room of which the plaintiff, a

[1] Drum v. New England &c. Co., 180 Mass. 113; 61 N. E. 812 (1901); Birmingham Furnace &c. Co. v. Gross, 97 Ala. 220; 12 So. 36 (1893); Allen v. Smith Iron Co., 160 Mass. 557; 36 N. E. 581 (1894).

[2] 97 Ala. 220; 12 So. 36 (1893).

[3] O'Connor v. Neal, 153 Mass. 281, 283; 26 N. E. 857; McGiffin v. Palmer's Shipbuilding Co., 10 Q. B. D. 5; May v. Whittier Mach. Co., 154 Mass. 29; 27 N. E. 768; Welch v. Grace, 167 Mass. 590; 46 N. E. 387 (1897).

mason, was pointing the windows. His assistant, a common laborer, placed one end of his staging on this rubbish, so that it rested unevenly on the floor, and when the plaintiff stepped upon the staging it tipped and caused him to fall. In delivering the court's opinion, Morton, J., says:

"Under the Employers' Liability Act[1] the presence of the rubbish on the floor could not be said to constitute a defect in the ways, works, or machinery. It was merely accidental and temporary, and nothing for which the defendants could be held liable."[2]

In McGiffin v. Palmer's Shipbuilding Co.,[3] a workman was killed by the fall of a heavy ball which had been negligently left in the roadway of the defendants' ironworks. It was held that this was a mere temporary obstruction in the roadway, and was not a defect in the condition of the way within the meaning of the statute, because it was not of a permanent or quasi-permanent character.[4]

In May v. Whittier Machine Co. (Mass.),[5] it was held that a pile of small pieces of wood about a foot high and eight and one-quarter inches wide, which had been placed in a space between machines in the defendant's works by a fellow servant, was an obstruction of "an accidental and temporary character," and did not constitute a defect in the condition of the ways for which the employer was liable.

The presence of a stone upon a staging used in the con-

[1] Mass. Stats. 1887, ch. 270.

[2] O'Connor v. Neal, supra, at p. 283.

[3] 10 Q. B. D. 5.

[4] In this case it was also held that if the person who left the ball in the roadway was the defendant's superintendent, the action could be maintained under the superintendence clause of this act. See also, Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 248; 12 So. 88.

[5] 154 Mass. 29; 27 N. E. 768.

struction of a building is not a defect in the condition of the ways, works, or machinery within the meaning of the Massachusetts act.[1]

In Alabama it was held in an early case that a pile of coal dumped near a railroad-track, at the request of a manufacturer of bricks, may constitute a defect in the condition of the "ways" of the railroad company within the meaning of the statute.[2] But this case has been expressly overruled, and the Alabama rule is now substantially like that of England and of Massachusetts.[3] In Kansas City &c. R. Co. v. Burton, just cited, it was held that a railroad-car left on one track in dangerous proximity to another track is not a defect in the condition of the "ways" of the employer within the statute, because it is merely a temporary obstruction, and not an inherent part of the ways.

So in Louisville &c. R. Co. v. Bouldin (Ala.),[4] an oil-box left dangerously near a track, which came in contact with a switchman's foot on a moving switch-engine, and threw him off, was held not to be a defect in the condition of the track, because it was a foreign substance having no connection with the track, and was a mere extraneous obstruction to the proper and safe use of the track.

§ 56. Momentary dangers and transitory defects in the ways, works, or machinery arising from negligence of superintendents, etc.—Although the employer is required to exercise reasonable care in providing safe ways, works and machinery as well as a safe place in which the work may be performed,[5] yet he is not obliged to keep them safe for

[1] Carroll v. Willcutt, 163 Mass. 221; 39 N. E. 1016.

[2] Highland Ave. &c. R. Co. v. Walters, 91 Ala. 435, 444; 8 So. 357.

[3] Kansas City &c. R. Co. v. Burton, 97 Ala. 240, 247; 12 So. 88.

[4] 110 Ala. 185; 20 So. 325; 121 Ala. 197; 25 So. 903.

[5] Haskell v. Cape Ann Anchor Works, 178 Mass. 485; 59 N. E. 1113; Arkerson v. Dennison, 117 Mass. 407; McGovern v. Central Vermont R. Co., 123 N. Y. 280; 25 N. E. 373 (1890).

every moment of the time during which the work is being carried on. At common law the employer is not liable for transitory defects and dangers which arise during the progress of the work by reason of the act of a fellow servant or of a common-law superintendent in performing an ordinary detail of the work.[1]

So likewise the employer is not liable under the Employers' Liability Act for an injury caused by a defect of this nature, even if the defective condition arose from or had not been discovered or remedied owing to the negligent act of the person entrusted with the duty of seeing that the ways, works and machinery were in proper condition, or from the negligence of the superintendent.

In McCann v. Kennedy (Mass.),[2] the plaintiff was injured while at work upon a house in which the defendant was making some changes. He climbed a ladder, stepped through a window, and stepped upon a joist which had been sawed nearly through for a well-hole, and fell. The joist had been sawed shortly before the accident and the workman who sawed it testified without contradiction that he had cut it a moment before the accident and had gone to get an ax to knock the joist out. The court held that it would be impracticable to require employers to warn their men of every such transitory risk, and that, therefore, the plaintiff could not recover upon the ground claimed of negligence on the part of the superintendent in not discovering and warning him of this danger.[3]

[1] Perry v. Rogers, 157 N. Y. 251; 51 N. E. 1021; McCampbell v. Cunard Steamship Co., 144 N. Y. 552; 39 N. E. 637; Stourbridge v. Brooklyn City R. Co., 41 N. Y. Supp. 128; 9 App. Div. (N. Y.) 129; Cullen v. Norton, 126 N. Y. 1; 26 N. E. 905; Armour v. Hahn, 111 U. S. 313; 4 S. Ct. 433; Flynn v. Campbell, 160 Mass. 128; 35 N. E. 453; Harnois v. Cutting, 174 Mass. 398; 54 N. E. 842; Brady v. Norcross, 172 Mass. 331; 52 N. E. 528.

[2] 167 Mass. 23; 44 N. E. 1055.

[3] See also, Donovan v. American Linen Co., 180 Mass. 127; 61 N. E. 808 (1901).

A negligent order, however, given by a superintendent, may render the employer liable for an injury occasioned by acting upon the order.[1]

In Eaves v. Atlantic Novelty Mfg. Co. (Mass.),[2] the plaintiff had her fingers cut off in a machine known as an ending-machine, and sued under the Massachusetts Employers' Liability Act, claiming that her injury was caused by the negligence of the defendant's superintendent. It appeared in evidence that one Talbot, the superintendent, ordered the plaintiff to start up the machine at a time when he had reason to know that the machine was out of order; that she started up the machine, and by reason of the violent and unusual shaking of the machine her hand was thrown from its usual place and the presser came down upon her fingers and crushed them. It was held that this was a negligent order on the part of the superintendent for which the defendant was liable.

A defect in the permanent part of the ways, works or machinery may render an employer liable to his employees, though the defect could be remedied so as to render the condition safe by temporary repairs. The mere fact that the defect does not interfere with the working capacity of the ways, works or machinery does not relieve the employer. In Willey v. Boston Electric Light Co. (Mass.),[3] the plaintiff was injured by reason of a defect in the insulation of an electric wire, which defect could not have been repaired before the accident, but the danger was discovered and could have been removed or guarded against before the accident by the person entrusted with the duty of seeing that defendant's ways, works and machinery were in proper condition. It was held that the defendant was liable under the Employers' Liability Act.

[1] Sullivan v. Thorndike Co., 175 Mass. 41; 55 N. E. 472; Eaves v. Atlantic Novelty Mfg. Co., 176 Mass. 369; 57 N. E. 669.

[2] 176 Mass. 369; 57 N. E. 669.

[3] 168 Mass. 40; 46 N. E. 395; 37 L. R. A. 723.

§ 57. Proper appliances within reach.—An employer who furnishes proper tools or appliances, within convenient reach, is not liable to an employee who is injured while using a defective tool or instrument. In supplying proper instruments the employer has done his whole duty, and is not liable either at common law[1] or under this clause of the statute.[2]

In Thyng v. Fitchburg R. Co. (Mass.),[3] a freight-brakeman was thrown off a train and killed by its breaking apart, caused by the use of too short a coupling-pin. The defendant always kept a supply of pins in the yard and in the caboose of the train, and a proper one could have been found in either of those places by the men who made up the train. In an action under the statute by the brakeman's administratrix it was held that the failure to select a proper pin under the circumstances was not an act for which the defendant was liable.

In Allen v. Smith Iron Co. (Mass.),[4] a furnace attendant was killed by the breaking of a wooden lever held by a fellow workman, which allowed the iron door to the furnace to swing down and strike the deceased. There was no evidence that the wooden lever was defective, except that it broke, and had been in use for a long time. The employer kept a stock of lumber of the proper size on hand, and the deceased could have obtained a new lever at any time by asking for it. He was the person in immedi-

[1] Carroll v. Western Union Tel. Co., 160 Mass. 152; 35 N. E. 456; Johnson v. Boston Tow-Boat Co., 135 Mass. 209; 46 Am. R. 458; McKinnon v. Norcross, 148 Mass. 533; 20 N. E. 183; Miller v. New York &c. R. Co., 175 Mass. 363; 56 N. E. 282 (1900); Young v. Boston &c. R. Co., 168 Mass. 219; 46 N. E. 624 (1897).

[2] Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 L. R. A. 425; Allen v. Smith Iron Co., 160 Mass. 557; 36 N. E. 581. If a superintendent is negligent in not furnishing proper tools or appliances, the employer may be liable under another clause of the statute.

[3] 156 Mass. 13; 30 N. E. 169; 32 L. R. A. 425.

[4] 160 Mass. 557; 36 N. E. 581.

ate charge of the furnace. In an action under the statute by the administratrix it was held that the plaintiff could not recover. Holmes, J., for the court, says: "If such a stick can be said to be part of the works or machinery, the defendant's duty to the deceased did not require it to see that he called for a proper one. It was enough that it had proper ones within convenient reach."[1]

The mere fact that a wooden lever or other instrument breaks while in ordinary use is not sufficient evidence of a "defective condition," within the Employers' Liability Act, to justify a verdict for the plaintiff.[2]

§ 58. Latent defect.—The doctrine is well settled at common law that an employer is not liable for an injury caused by a hidden or latent defect which was not discoverable by the exercise of reasonable care or inspection on his part.[3]

A like rule applies in actions under the Employers' Liability Act.[4] In Louisville &c. R. Co. v. Campbell (Ala.),[5] a brakeman was thrown from a train while in motion by the breaking of a brake-rod. The place where the rod broke was about half bright and new and about half rusty and old, showing that the defect had existed for some time. The old break or crack was located under the

[1] Allen v. Smith Iron Co., supra, at p. 558, citing Carroll v. Western Union Tel. Co., 160 Mass. 152; 35 N. E. 456 (1893).

[2] Allen v. Smith Iron Co., 160 Mass. 557; 36 N. E. 581 (1894).

[3] Louisville &c. R. Co. v. Allen, 78 Ala. 494; Holland v. Tennessee Coal Co., 91 Ala. 444; 8 So. 524; 12 L. R. A. 232; Roughan v. Boston &c. Block Co., 161 Mass. 24; 36 N. E. 461; Spicer v. South Boston Iron Co., 138 Mass. 426, 430; Ladd v. New Bedford R. Co., 119 Mass. 412, 413; Ingalls v. Bills, 9 Met. (Mass.) 1; 43 Am. D. 346; Ballou v. Chicago &c. R. Co., 54 Wis. 257; 11 N. W. 559; De Graff v. New York Cent. &c. R. Co., 76 N. Y. 125.

[4] Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574; Coffee v. New York &c. R. Co., 155 Mass. 21, 25; 28 N. E. 1128; Roberts & Wallace Employers' Liability (3d ed.) 249.

[5] 97 Ala. 147; 12 So. 574.

ratchet-wheel, and between it and the bar or plate of iron on which the wheel rested, and could not have been seen or detected without taking out the rod-key underneath, and raising the rod several inches until the point where the crack was rose above the ratchet-wheel. The car had been inspected in the usual manner on the day of the accident, and during the run of one hundred and fifty miles just prior to the accident the plaintiff had himself applied the brake eight or ten times without noticing anything wrong about it. In an action under the Alabama act, it was held that the defect was a hidden one which could not have been discovered or remedied with reasonable care and inspection, and that the defendant railroad was not liable.

§ 59. Concealed danger, or trap.—A concealed danger in the employer's ways, works or machinery may render the employer liable to his employee injured by such defect where the employer's superintendent knows of such defect or by the exercise of due care could have discovered its existence, and neglects to warn the employee thereof.

In Dean v. Smith (Mass.),[1] the plaintiff while drilling rock was injured by an explosion of dynamite in the rock, which dynamite had been placed in the rock some time before and had failed to explode when fired. This failure to explode was known to the defendant's superintendent, who directed the plaintiff to drill a new hole, pointing toward the hole which contained the unexploded dynamite. It was held that the defendant was liable under the Employers' Liability Act for the negligence of his superintendent.

"One who is injured by a trap need not show, in order to recover his damages, if injured by it, either that he was careful or the defendant careless. The wrongful deceit,

[1] 169 Mass. 569; 48 N. E. 619.

of which his hurt is the natural consequence, is enough."[1] In McNamara v. Logan (Ala.),[2] a boy, while driving a mining-car down grade in a mine entry for the first time, and while running beside the car and attempting to sprag the wheels, as he had been ordered to do, was crushed between the wall and the car in a narrow space. The evidence was conflicting as to the width of the entry at this point, but the evidence for the plaintiff tended to show that the space between the wall and the car was only a foot and a half, and an expert called by the plaintiff testified that the rule was to have this space three feet wide, and that a foot and a half was unsafe. It was held that the evidence warranted a finding that there was a defect in the ways of the defendant within the meaning of the Alabama statute.

A like rule prevails in actions at common law, and the employer is liable for injuries sustained by his employee by reason of a trap or concealed danger in the arrangement of the premises, or plant, as well as for such dangers in the ways, works, or machinery, if the employer has actual or presumptive knowledge thereof, and fails to warn the employee.[3] In Austin v. Fitchburg R. Co. (Mass.),[4] some heavy stones were loaded on a flat-car without cleats or stakes of any kind to hold them in position. It was customary to secure such stones with stakes and cleats or blocking. The stones remained in this con-

[1] Kilberg v. Berry, 166 Mass. 488, 491; 44 N. E. 603, per Barker, J.

[2] 100 Ala. 187; 14 So. 175.

[3] Eastland v. Clarke, 165 N. Y. 420; 59 N. E. 202 (1901) (hole or well in dark cellar); Coates v. Boston &c. R. Co., 153 Mass. 297; 26 N. E. 864 (1891) (jaw-strap on coal-car missing); Spaulding v. Forbes Lith. Mfg. Co., 171 Mass. 271; 50 N. E. 543 (tipping seat in connection with automatically opening and shutting jaw of cylinder); Ferren v. Old Colony R. Co., 143 Mass. 197; 9 N. E. 608 (track and wall of building); Hopkins v. O'Leary, 176 Mass. 258; 57 N. E. 342 (the plaintiff, while picking and shoveling in a trench, was injured by an explosion of dynamite in the trench).

[4] 172 Mass. 484; 52 N. E. 527.

dition for a week, and while plaintiff, a brakeman, was coupling this car to a train, the concussion of the cars forced a stone over the edge of the car, and crushed the plaintiff's arm. It was held that he could recover at common law, and that the evidence warranted the jury in finding that the defendant was negligent in furnishing for transportation a car that was loaded in a dangerous and insecure manner. There was also a count under the Employers' Liability Act, but the court held that it was unnecessary to consider whether there was any evidence of the negligence of a superintendent.[1]

In City of Fort Wayne v. Patterson (Ind.),[2] it was said by Mr. Justice Black, for the court, that the employer's notice of the unsafe condition of the place where work is performed for him will be presumed, and that a servant is not bound to search the place for latent or hidden defects or perils, but is only required to observe such obvious defects and perils as the exercise of reasonable care, skill, and diligence on his part, according to the circumstances, will enable him to know or discover.

Cinders newly placed on top of mud and forming a footway of a railroad-track do not constitute a hidden or concealed danger, though they are "loose, movable and treacherous." "It is a matter of common observation, and must have been known to the appellee," says Mr. Justice Hackney, "that cinders newly placed upon the ground, when the ground is hard or soft, will yield under the feet of a man who is in the attitude of pushing with the weight of his body and the strength of his muscles, his feet upon the cinders and his shoulder against a heavy car."[3]

[1] Citing Donahoe v. Old Colony R. Co., 153 Mass. 356; 26 N. E. 868; Davis v. New York &c. R. Co., 159 Mass. 532; 34 N. E. 1070; Fairman v. Boston &c. R. Co., 169 Mass. 170; 47 N. E. 613.

[2] 25 Ind. App. 547, 558; 58 N. E. 747.

[3] Louisville &c. R. Co. v. Kemper, 147 Ind. 561, 566; 47 N. E. 214.

§ 60. Injury not caused by defect alleged.—Even if there be a defect in the machinery, yet, if the injury was not caused by that defect an employee can not recover of the master, either at common law[1] or under the Employers' Liability Act.[2]

In Brady v. Ludlow Mfg. Co. (Mass.),[3] the plaintiff was injured while at work removing waste from his carding-machine in defendant's factory, by a gate swinging to and pushing him upon the gears of the machine. In delivering the opinion of the court, Mr. Justice Knowlton says, on page 471: "The defect in the gate was that, when swung together, it would not catch on the fastening, and, if fastened, would not stay so, but would stand a little way open. * * * But the defect had no connection with the accident. If the device for fastening the gate had worked perfectly, it would have made no difference to the plaintiff, for he could not clean the gears without keeping the gate open. There was no evidence that he was injured by reason of any defect or want of repair in the defendant's machinery or appliances."

§ 61. Machinery need not be the safest or best known in use.—Neither at common law nor under the Employers' Liability Act is the employer required to furnish the safest or the best known machinery in use, or that with the latest improvements in safety appliances.[4] He performs his duty towards his employees when he furnishes machinery which is reasonably safe and adapted to the purpose for which it is used.

[1] Sullivan v. Wamsutta Mills, 155 Mass. 200; 29 N. E. 516.

[2] Brady v. Ludlow Mfg. Co., 154 Mass. 468; 28 N. E. 901.

[3] 154 Mass. 468; 28 N. E. 901.

[4] O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 137; 32 N. E. 1119; Washington &c. R. Co. v. McDade, 135 U. S. 554; 10 S. Ct. 1044.

In Alabama it is a sufficient fulfilment of the employer's duty to adopt such machinery or appliances as are in ordinary use by prudently-conducted concerns engaged in like business and surrounded by like circumstances. This rule applies to actions under the Employers' Liability Act as well as to actions at common law.[1]

§ 62. Absence of guards, cleats, rails, etc.—Whether the absence of a guard, cleat, rail, or other form of protection from danger constitutes a "defect in the condition" of the employer's ways, works, or machinery within the meaning of the statute, depends upon the essential nature of the object itself, and the use for which it was intended.

In Gustafsen v. Washburn &c. Mfg. Co. (Mass.),[2] a workman, while assisting in pulling a loaded car along a railroad-track on the defendant's premises, fell into a ditch across the track, and was instantly killed by the car falling on top of him. The ditch was open and visible, but not guarded, and had been dug that morning without warning to the employees, who had been accustomed to use the track, among whom was the deceased. In pulling the car, the deceased was naturally obliged to lean forward and bend down towards the track. In an action under the Employers' Liability Act it was held that, in the absence of direct evidence that the deceased knew of the ditch, the plaintiff was entitled to go to the jury on the question as to whether there was a defect in the condition of the ways used in the defendant's business which arose from its negligence.

The absence of a blocking appliance to a truck, used to

[1] Richmond &c. R. Co. v. Bivins, 103 Ala. 142; 15 So. 515, 517; Wilson v. Louisville &c. R. Co., 85 Ala. 269; 4 So. 701; Georgia Pacific R. Co. v. Propst, 83 Ala. 518; 3 So. 764; Louisville &c. R. Co. v. Allen, 78 Ala. 494.

[2] 153 Mass. 468; 27 N. E. 179.

transport heavy articles from one part of a floor to another, is not a defect in the condition of the tool or machine within the meaning of the Massachusetts act.[1]

In Graham v. Boston &c. R. Co. (Mass.),[2] a freight-brakeman, while engaged in uncoupling cars in motion, had his hand crushed by the slipping backwards of an oil-tank. As the plaintiff reached over with his right hand to pull the coupling-pin, he reached back with his left hand for a grab-iron, or handle, by which to steady himself. The car had no grab-iron, and the plaintiff took hold of the end-block on the tank-car, to save himself, when the engineer started up the train, after receiving the signal. This brought his left hand near the oil-tank; and when the train was started with a jerk, the tank shifted and crushed his hand. In an action under the statute, it was held that whether the oil-car was defective for want of a grab-iron was a question of fact for the jury to decide.

The absence of a guard to a circular saw, which guard had been removed by the person whose duty it was to see that it was in proper condition, is a defect in the condition of the employer's machinery, which renders him liable under the Employers' Liability Act to an employee injured by reason of the guard's absence.[3]

§ 63. Same.—The absence of hooks or stays to a ladder, used in an engine-room for the purpose of turning on steam to a donkey-engine at some distance above the floor, may warrant a finding that there was a defect in the condition of the plant within the meaning of the English act of 1880.[4]

[1] O'Keefe v. Brownell, 156 Mass. 131; 30 N. E. 479.
[2] 156 Mass. 4; 30 N. E. 359.
[3] Tate v. Latham, (1897) 1 Q. B. 502. In this case that of Willetts v. Watt, (1892) 2 Q. B. 92, was distinguished.
[4] Weblin v. Ballard, 17 Q. B. D. 122.

In an action under the Alabama act by a conductor against a dummy-railroad company for personal injuries caused by his train running into an open switch, which switch had no lock or other fastening, the question whether the absence of a lock or fastener constituted a defect was held to depend upon utility and the usage and custom of well-regulated roads.[1]

Under the Massachusetts act, the absence of a latch or lock to a shifting-bar of a machine, to prevent it from starting automatically by the driving belt slipping from the loose pulley on to the tight pulley, is not a defect in the condition of the employer's machinery, even if an expert testifies that the machine was dangerous without it, and a verdict should be ordered for the defendant if nothing further appears.[2]

The failure of a building-contractor to shore up the wall of an old house which he is pulling down for the owner, whereby the wall falls upon one of his employees, is a defect in the condition of his works for which he is liable under the English act.[3]

§ 64. Unsuitableness of ways, works, or machinery.— A defect in the condition of the employer's ways, works or machinery within the meaning of the Employers' Liability Act may consist in the unsuitableness of the tool or appliance for the purpose for which it was used and intended. Thus, in Geloneck v. Dean Steam Pump Co. (Mass.),[4] the plaintiff while engaged with others in moving a large iron pump upon a truck from one part of the defendant's works to another, was injured by the falling of the pump. It appeared that the truck was in good

[1] Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457.
[2] Ross v. Pearson Cordage Co., 164 Mass. 257; 41 N. E. 284; 49 Am. St. 459.
[3] Brannigan v. Robinson, (1892) 1 Q. B. 344.
[4] 165 Mass. 202; 43 N. E. 85.

repair and suitable for certain kinds of work, but that there were no washers on the truck and that this absence of washers rendered the truck unsuitable for the work of moving such a large iron pump as the one in question. It was held that the defendant was liable for furnishing an appliance which was unsuitable for the use to which it was put, and that such unsuitableness was neither accidental nor temporary, nor due to the negligence of the workman who was charged with the duty of attending to the fitness of the ways, works and machinery. "An employer," says Judge Barker for the court, on page 217, "can not say that he is not in fault, if his ways, works and machinery, when used as he intends them to be used, are unsuitable for his work."[1]

In Gunn v. New York &c. R. Co. (Mass.),[2] the plaintiff was injured by a heavy locomotive falling upon him while he was engaged with others in transporting the locomotive upon a truck. One of the wheels of the truck broke, although the iron was sound where the wheel broke, and the truck was suitable for less heavy loads. It appeared that the truck had been in use for fifteen years, and that the effect of rolling such trucks on iron rails was to flatten out the wheels, which tended to weaken the wheels, especially when used for supporting very heavy weights. It further appeared that during the time that the truck had been in use the locomotives had increased considerably in weight, and that the locomotive in question was one of the heaviest in use by the defendant railroad. It was held that the evidence warranted a finding that the truck was unsuitable for the use to which it was put, and that the plaintiff was entitled to recover.

[1] Citing Smith v. Baker, (1891) A. C. 325.
[2] 171 Mass. 417; 50 N. E. 1031.

A like rule prevails in England under the Employers' Liability Act of 1880. In Weblin v. Ballard,[1] a ladder without hooks or stays was used, with the employer's knowledge, upon a crooked steam-pipe in an engine-house, and while the plaintiff's husband was using the ladder it slipped and precipitated him to the ground and caused his death. Both the ladder and the steam-pipe were in good working condition, but it was held that this was a defect in the condition of the ways or plant of the defendant for which he was liable to the plaintiff.[2]

§ 65. Miscellaneous cases.—A vicious habit of kicking in a horse is a "defect" within the meaning of the English act of 1880.[3]

A plank only eight inches wide, laid upon rafters three feet apart and thirty feet above the floor of a building, upon which plank the plaintiff's intestate, a night-watchman, was required to walk in the discharge of his duties, constitutes a defect in the condition of the ways within the terms of the Alabama Employers' Liability Act.[4]

In Prendible v. Connecticut River Mfg. Co. (Mass.),[5] a staging, upon which the plaintiff was standing to pile up wood, fell, and injured him. The staging was about fifteen feet high, twenty feet long, and five feet wide, and was moved from place to place, and used in piling wood. It was erected by the side of a woodpile, and was held in position by three brackets, each of which was fastened to the woodpile by six wooden cleats, one end of each cleat being nailed to the woodpile, and the other end to the upright part of the bracket. There were three nails at

[1] 17 Q. B. D. 122.

[2] See also, Heske v. Samuelson, 12 Q. B. D. 30; Cripps v. Judge, 13 Q. B. D. 583.

[3] Yarmouth v. France, 19 Q. B. D. 647.

[4] United States Rolling Stock Co. v. Weir, 96 Ala. 396; 11 So. 436.

[5] 160 Mass. 131; 35 N. E. 675.

each end of each cleat, and the cleats were about two feet long, about two inches wide and an inch thick. The staging was designed to hold a quantity of wood and two men. There was one prop, or support, at one end of the staging when it fell. It was held that the jury was warranted in finding that there was a defect in the condition of the staging within the meaning of the statute; and that as this defect was not discovered or remedied, owing to the negligence of a person entrusted by the defendant with the duty of seeing that the ways, works or machinery were in proper condition, the plaintiff was entitled to recover.

In Willetts v. Watt[1] the plaintiff, while passing from one part of the defendant's workshop to another in the discharge of his duties, fell into a catchpit, the lid of which had been removed shortly before, for the first time in five years, to make some repairs. The lid was level with the floor, and was ordinarily used as part of the floor for walking. It was held by the court of appeal, in an action under the Employers' Liability Act, that this did not constitute a defect in the condition of the way within the meaning of the statute, but was merely a negligent user of the way by the person who caused the removal of the lid.[2] Fry, L. J., says, in his opinion, on page 100: "The way was properly constructed for a two-fold purpose: the well or catchpit might be used when required, or the place might be used for general purposes, including that of a way. It was properly adapted to subserve both these purposes, and the cause of the accident was not deficient construction, but that it was negligently used for one of the purposes without notice to persons who were using it for the other."

[1] (1892) 2 Q. B. 92.

[2] As the person who caused the removal of the lid was probably a superintendent, the plaintiff was granted the right to retry his case under subsection 2, upon the payment of costs.

§ 66. Dangerous method of doing work as a defect in the ways, works, or machinery.—In England it has been held by Lord Watson in the house of lords that a dangerous method of doing work or business may constitute a defect in the condition of the employer's ways, works, or machinery, within the meaning of the Employers' Liability Act.[1]

In Massachusetts this point has not yet been decided by the supreme judicial court, but in Caron v. Boston &c. R. Co. (Mass.),[2] Mr. Justice Morton in delivering the opinion of the court uses this language: "The court instructed the jury, in effect, that a method adopted by an employer for carrying on his business which involved danger to one or more of his servants while they were in the discharge of their duty and using reasonable care would be a defect in the ways, works, and machinery. As there may be a new trial, we think it advisable to advert to the instruction thus given. No case has yet gone so far in this state as to hold that a dangerous method of doing business may constitute a defect in the ways, works, or machinery, though there is high authority for it in England, on which the learned judge who tried the case in the superior court evidently relied.[3] We do not think it necessary to consider the question in the present aspect of the case before us, since, as the exceptions stand, we are of opinion that, even if the method adopted was a dangerous one, the plaintiff's intestate must be held to have taken the risk of it."

It would seem that a dangerous method of doing work would generally arise from the personal negligence of the employer, or from that of his superintendent, and could be more properly described as such under the superin-

[1] Smith v. Baker, (1891) A. C. 325, at 354.
[2] 164 Mass. 523, 530; 42 N. E. 112.
[3] Smith v. Baker, (1891) A. C. 325, 354, per Lord Watson.

tendence clause of the statute. Lord Watson's opinion was rendered in a case involving a very exceptional state of facts, where the negligent act which injured the plaintiff was done by a person in another department of the work, who had no control or superintendence over the plaintiff.[1]

[1] Some cases relating to dangerous methods of doing work, attributable to the orders of superintendents, are cited in § 247, post.

CHAPTER III.

WAYS, WORKS, MACHINERY OR PLANT.

SECTION

67. Statutory provisions.
68. Definitions and illustrations.
69. "Machinery" defined.
70. Temporary structures.
71. Works in process of construction or destruction.
72. Movable staging owned by defendant.
73. Movable stairs owned by third person.
74. Foreign car used by defendant for its own benefit.
75. Same.
76. Foreign car not used by defendant, but merely forwarded empty.
77. Railroad-track of connecting road.
78. Ways, works, etc., used but not controlled by employer.
79. Injury to employee of independent contractor.
80. Same—Contractor may act in another capacity.

§ 67. Statutory provisions.—The Massachusetts and Colorado acts relate to defects in the condition of the "ways, works or machinery,"[1] except that, in the sections respecting the liability of an employer to an employee of an independent contractor, the term "plant" is used in addition to the terms "ways, works or machinery."

The Alabama and English acts relate to defects in the condition of the "ways, works, machinery or plant."[2] The Indiana act relates to "ways, works, plant, tools and machinery."[3]

§ 68. Definitions and illustrations.—Wires forming part of a railroad's electric system of signals, so attached to the rails and sleepers as to transmit the electric current, are a part of the "ways, works or machinery" of

[1] Mass. St. 1887, ch. 270, § 1, cl. 1; Rev. Laws 1902, ch. 106, § 71; Colo. St. 1893, ch. 77, § 1, cl. 1.

[2] Ala. Code of 1896, § 1749, cl. 1; 43 & 44 Vict., ch. 42, § 1, cl. 1.

[3] Burns R. S. Ind. 1901, § 7083, cl. 1.

the railroad, within the meaning of the Massachusetts statute.[1]

To constitute a "way" within the meaning of the statute, it is not necessary that it should be marked out or defined, or that it should be habitually used as a way. In the case of a workshop it has been held that the course which the workmen ordinarily take in going from one part of the shop to another in the discharge of their duties is such a way.[2]

An "exploder" used in blasting rock, consisting of a copper covering filled with fulminate of mercury, which is bought by a quarry-owner and instantly consumed in the use of causing an explosion by electricity, is not a part of his "ways, works or machinery," within the meaning of the Massachusetts statute.[3]

A ladder or handhold on a railroad freight-car is part of the "ways, works, machinery or plant," within the meaning of the Alabama statute.[4]

A horse is a part of the "plant" of a warehouseman, within the meaning of the English statute.[5]

A pile of boards in a lumber-yard is not ways, works, or machinery;[6] nor two ladders spliced together.[7]

§ 69. "Machinery" defined.—The term "machinery," as used in the Alabama act, has been defined by the supreme court of that state as follows:

"The term 'machinery' embraces all the parts and instruments intended to be, and actually operated, from time to time, exclusively by force created and applied by

[1] Brouillette v. Connecticut River R. Co., 162 Mass. 198; 38 N. E. 507.
[2] Willetts v. Watt, (1892) 2 Q. B. 92; Dolphin v. Plumley, 167 Mass. 167; 45 N. E. 87 (1896).
[3] Shea v. Wellington, 163 Mass. 364; 40 N. E. 173.
[4] Louisville &c. R. Co. v. Pearson, 97 Ala. 211; 12 So. 176.
[5] Yarmouth v. France, 19 Q. B. D. 647.
[6] Campbell v. Dearborn, 175 Mass. 183; 55 N. E. 1042 (1900).
[7] McKay v. Hand, 168 Mass. 270; 47 N. E. 104 (1897).

mechanical apparatus or contrivance, though the initial force may be produced by the muscular strength of men or animals, or by water or steam or other inanimate agency.[1] The carding, spinning and weaving machines, together with the instrumentality by which the prime motive power is created or applied, constitute the machinery of a cotton-mill. When cars, though used at times and at other times detached, are formed into a train, to which the propelling force is imparted by means of a locomotive, the entire train constitutes machinery connected with or used in the business. * * * A hammer is a tool or instrument ordinarily used by one man in the performance of manual labor. It may be made an essential part of machinery when intended to be, and is, operated by means thereof; but when disconnected from any other mechanical appliances, and operated singly by muscular strength directly applied, such tool or instrument is not 'machinery' in its most comprehensive signification, or in the meaning of the statute."[2] It was accordingly held that the plaintiff could not recover for an injury caused by a defective hammer, which was disconnected from other mechanical appliances and was operated singly by muscular strength directly applied.

For like reasons it has also been decided that a steel bar used by hand in aligning a railroad-track is not "machinery" within the meaning of the statute

§ 70. Temporary structures.—The words "ways" and "works" in the statute apply only to ways and works of a permanent or quasi-permanent character. They do not apply to ways or works of a merely temporary character, although they are connected with or used in the business of the employer. Hence, it has been held under the

[1] Citing Seavey v. Central Ins. Co., 111 Mass. 540.
[2] Georgia Pacific R. Co. v. Brooks, 84 Ala. 138, 140, 141; 4 So. 289.
[3] Clements v. Alabama &c. R. Co., 127 Ala. 166; 28 So. 643 (1900).

Massachusetts act that a temporary staging, put up by masons employed by a contractor to erect a building on the land of a third person, is no part of the contractor's ways or works, and that he is not liable to an employee for an injury caused by a defect in the condition of the staging.[1]

So, in Lynch v. Allyn (Mass.),[2] in which the plaintiff was injured by the caving in of a bank of earth upon which he was working, on the land of a third person, the court says, through Mr. Justice Lathrop, on page 252: "The language of the section seems to us to point to ways and works of a permanent character, such as are connected with or used in the business of the employer." It was accordingly held that the liability of a bank of earth upon the land of a third person to fall when undermined by workmen, if not shored up, is not a "defect in the condition of the ways, works, or machinery connected with or used in the business of the employer," when the work on the bank is simply the leveling of it for grading the land of a person other than the defendant.

The failure to furnish a temporary platform or scaffold for repairing a chimney on the employer's works or plant does not constitute a defect in the condition of the works or plant within the meaning of the act.[3]

Three planks fastened together by a piece of wood nailed underneath in the middle, and placed across the corner of a building in process of construction, and used by the defendant's workmen in going through the building, are no part of the ways or works within the meaning

[1] Burns v. Washburn, 160 Mass. 457; 36 N. E. 199; Reynolds v. Barnard, 168 Mass. 226; 46 N. E. 703 (1897).

[2] 160 Mass. 248; 35 N. E. 550.

[3] Birmingham Furnace &c. Co. v. Gross, 97 Ala. 220; 12 So. 36 (1893). In this case a ladder was used to make some repairs on a tall chimney, and the plaintiff claimed that a temporary scaffold should have been erected.

of the statute, because they are used merely for a temporary purpose.[1]

§ 71. Works in process of construction or destruction.— It has been decided under the English act that the owner of works in process of construction is not liable to an employee for an injury caused by a defect in their condition, because until they are completed they can not be said to be "connected with or used in the business of the employer," within the meaning of the statute.[2] In Conroy v. Inhabitants &c. (Mass.),[3] where an employee was killed by the caving in of a sewer-trench in course of construction, the court remarked that the question whether the case fell within the terms "ways" or "works" in the Massachusetts act was "not free from difficulty." The decision, however, turned upon another point, and the court deemed it unnecessary to determine this question.

The case of a building-contractor is, however, different from that of an owner in this respect. Works in process of construction or demolition by a builder are "connected with or used in the business" of such a person, and therefore he is liable to one of his employees who is injured by a defect in their condition. In Brannigan v. Robinson,[4] the defendant, a builder, was engaged to pull down an old house belonging to a third person. During the course of the work he ordered the plaintiff, a laborer in his employment, to remove certain debris which lay on the ground near one of the standing walls. The defendant had neglected to have this wall shored up, and it fell upon the plaintiff and caused the injuries complained of. It was held that the defendant was liable under the act. Lawrence, J., says on page 346: "The defendant was a

[1] Morris v. Walworth Mfg. Co., 181 Mass. —; 63 N. E. 910 (1902). See also, Beique v. Hosmer, 169 Mass. 541; 48 N. E. 338 (1897).

[2] Howe v. Finch, 17 Q. B. D. 187.

[3] 158 Mass. 318, 220; 33 N. E. 525.

[4] (1892) 1 Q. B. 344.

builder, whose business it was to pull down walls, as well as to build them up. The walls he deals with must be just as much works connected with his business in the one case as in the other." Wright, J., says on page 347: "The question is whether, under those circumstances, the insecurity of the wall was not a defect in the condition of the works within the meaning of the act. If we were to hold that it was not, I think we would be putting an unduly narrow interpretation upon the word 'works,' and should be excluding from the operation of the act a large class of businesses which are not carried on upon any fixed site. I can not see why premises which are in the possession of a person for the purposes of his business should not be regarded as the works of such person so long as he is carrying on his business there. The case of Howe v. Finch[1] is not in any way inconsistent with our judgment, for in that case the employer who was sued was not the builder, but the owner of the premises, and the wall, being still in an unfinished state and in the possession of the builder at the time of the accident, could not have been said to be connected with or used in the business of the employer."

A subcontractor who merely has a contract to do part of the work in erecting a building is not liable to the same extent as a contractor who has control of the whole work. In Beique v. Hosmer (Mass.)[2] a carpenter was injured by falling through a hole cut through the covering of the first floor of a building in process of construction. The defendant had a contract to do the carpentry-work upon an addition to the Lyman mills, and one Prew had a contract for concreting the basement, both under one Dodge, who was the general contractor. The hole through which the plaintiff fell was cut by Prew under

[1] 17 Q. B. D. 187.
[2] 169 Mass. 541; 48 N. E. 338.

authority from Dodge. It was held that the building was not "ways, works or machinery connected with or used in the business" of the defendant, because he was merely a subcontractor who was helping to construct the building, and that therefore the plaintiff could not recover under the Employers' Liability Act.

In Southern R. Co. v. Moore (Ala.)[1] it was ruled that a rope used in the work of building a trestle for a railroad company, used to lower heavy timber into place, is not a part of the ways, works, machinery, or plant of the railroad company, and therefore a carpenter can not recover for injuries suffered by reason of a defect in the rope's condition.

An employer is, however, liable for the negligence of his superintendent, under another clause of the statute, while engaged in superintending the building or construction of his ways, works, or machinery.[2]

§ 72. Movable staging owned by defendant.—In Prendible v. Connecticut River Mfg. Co. (Mass.)[3] an employee was injured by the fall of a staging owned and used by the defendant. The staging was fifteen feet high, twenty feet long, and five feet wide, and was used in the yard of defendant's sawmill by the workmen in piling up the wood. It was moved from place to place as the work required, and was generally used in one place for four days or a week at a time. It was held that the staging, when erected, was a part of the "ways, works or machinery" of the defendant, within the meaning of the statute

§ 73. Movable stairs owned by third person.—In Regan v. Donovan (Mass.)[4] the plaintiff was injured by the slip-

[1] 128 Ala. 434; 29 So. 659 (1901).

[2] Lynch v. Allyn, 160 Mass. 248; 35 N. E. 550; Hennessy v. City of Boston, 161 Mass. 502; 37 N. E. 668; post, §§ 91, 92.

[3] 160 Mass. 131; 35 N. E. 675.

[4] 159 Mass. 1; 33 N. E. 702.

ping of a flight of movable stairs. The defendants were contractors and builders, and were employed by one Roughan to do some work in his cellar. Several months before this the defendants had constructed the stairs for Roughan, and put them in the cellar. The plaintiff was ordered by one of the defendants to take a bar of iron down the stairs, and while in the act of doing so the stairs slipped and he was injured. It was held that the stairs were not a part of the ways connected with or used in the business of the defendant, within the terms of the Employers' Liability Act, and that the plaintiff could not recover. In the court's opinion, delivered by Mr. Justice Allen, it is said: "Nor can the action be supported under the Employers' Liability Act, St. 1887, ch. 270, on the ground that there was a defect in the ways connected with or used in the business of the employer. It can not be held that the defendants adopted the stairs as a way used in their business."

§ 74. Foreign car used by defendant for its own benefit. —It is settled that a foreign car, one not belonging to the defendant, constitutes a part of the defendant's "works or machinery" within the meaning of the statute, if it is used by the defendant for its own benefit. Such use may be in the form of a charge for freight for hauling over its road,[1] or it may be in the form of a hiring for use from another person or corporation.[2] In any such case, the fact that the defendant is not the owner of the car is immaterial. For the time being, the car is a part of the defendant's rolling-stock.

In Bowers v. Connecticut River R. Co. (Mass.),[3] Mr. Justice Allen, in delivering the opinion of the court,

[1] Bowers v. Connecticut River R. Co., 162 Mass. 312; 38 N. E. 508.
[2] Spaulding v. Flynt Granite Co., 159 Mass. 587; 34 N. E. 1134.
[3] 162 Mass. 312, 317; 38 N. E. 508.

says: "The first question under this count is, whether the cars were a part of the ways, works and machinery used in the business of the defendant, within the meaning of the statute. They were loaded freight-cars, which had come from other railroads, and which were to be hauled over a part of the defendant's railroad for the transportation of the freight contained therein, in the due course of the defendant's business. For the time being, they were used in the defendant's business as a part of its rolling-stock. The fact that the defendant did not own them is immaterial. The defendant was not bound to use them in its train if, on inspection, they were found to be unsafe. We think cars so used must be deemed to be a part of the defendant's works and machinery."[1]

In Spaulding v. Flynt Granite Co. (Mass.)[2] the plaintiff was injured by a defective brake in a car belonging to the Boston & Albany Railroad, which the defendant was using to transport its stone from the quarry to the railroad-track. The chief defense was that, as the defendant had to take such cars as it could get from the railroad company, it should not be held to the rule as to furnishing proper instrumentalities, but only to the duty of inspection.[3] The court held, however, that the defendant was liable on the ground that it had failed to furnish proper appliances in the transaction of its business. In delivering the opinion, Holmes, J., says: "Whatever may be said of a car received by a railroad only for the purpose of being forwarded, and not used by it at all in the process,[4] this car was used by the defendant as one of the instruments of its business.

[1] Citing Coffee v. New York &c. R. Co., 155 Mass. 21; 28 N. E. 1128; Gottlieb v. New York &c. R. Co.,100 N. Y. 462; 3 N. E. 344; Fay v. Minneapolis &c. R. Co., 30 Minn. 231; 15 N. W. 241.

[2] 159 Mass. 587; 34 N. E. 1134.

[3] Mackin v. Boston &c. R. Co., 135 Mass. 201; 46 Am. R. 456; Keith v. New Haven Co., 140 Mass. 175, 180; 3 N. E. 28.

[4] Coffee v. New York &c. R. Co., 155 Mass. 21, 23; 28 N. E. 1128.

When that is the case, it does not matter whether the defendant owns the thing used or borrows it. The responsibility of the master to his servants is the same either way. * * * Probably, if the defendant had seen fit to furnish its own cars, it could have done so. Certainly it was at liberty to carry the stone to the railroad by other means if it preferred. Even if the course of business adopted was the only one commercially practicable, there was nothing to hinder the defendant from seeing that the cars furnished it were put into proper condition before they were used."[1]

§ 75. Same.—In Alabama it has been held that, if the defendant uses a foreign car, it is liable to an employee under the statute for a defect in its condition, to the same extent as if the car belonged to the defendant.[2]

In Gottlieb v. New York &c. R. Co. (N. Y.),[3] Mr. Justice Earl, speaking for the court, says: "It [a railroad company] is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much, at least, is due from it to its employees. The employees can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects, the duty of

[1] Spaulding v. Flynt Granite Co., supra, at pp. 588, 589.

[2] Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552; Alabama &c. R. Co. v. Carroll, 97 Ala. 126; 11 So. 803; 18 L. R. A. 433.

[3] 100 N. Y. 462, 469; 3 N. E. 344.

the company is the same as to all cars drawn over its road." It was accordingly held that bumpers only three inches wide on foreign freight-cars, which defendant was transporting loaded over its line, were defects which should have been discovered by ordinary inspection; and that the defendant railroad was liable to a brakeman in its employ who was crushed between such cars while attempting to couple them.[1]

In Baltimore &c. R. Co. v. Mackey[2] a car-inspector and repairer in the defendant's employ was crushed between two cars while repairing a draw-head. The injury was caused by a defective brake on a loaded foreign car, which allowed a train of freight-cars to go down grade and to bump into the cars that deceased was repairing. It was held that knowledge of the defective brake could not be imputed to the deceased, because he had had no opportunity to see it, and that the defendant railroad was liable. In delivering the court's opinion, Mr. Justice Harlan says, on page 91: "We are of opinion that sound sense and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employees to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train."

§ 76. Foreign car not used by defendant, but merely forwarded empty.—Under the original Massachusetts act it was held that an empty car belonging to another railroad company, which was received and forwarded by the defendant company without using it in the process for its own benefit, was not part of the "ways, works or machinery connected with or used in the business of the

[1] See also, Goodrich v. New York &c. R. Co., 116 N. Y. 398; 22 N. E. 397; 15 Am. St. 410; Reynolds v. Boston &c. R. Co., 64 Vt. 66; 24 Atl. 134; 33 Am. St. 908; Chicago &c. R. Co. v. Avery, 109 Ill. 314.

[2] 157 U. S. 72; 15 S. Ct. 491.

employer" within the meaning of the statute, and that accordingly the employer was not liable for an injury caused to an employee by reason of a defect in the brake-wheel of such a car.[1]

By the Massachusetts amendatory statute of 1893, ch. 359, the mere fact that a car is in the possession of a railroad company is declared to make it a part of its ways, works or machinery. The act reads as follows: "A car in use by or in the possession of a railroad company shall be considered a part of the ways, works or machinery of the company using or having the same in possession, within the meaning of this act, whether such car is owned by it or by some other company or person."[2]

This statute seems to change the rule announced in Thyng v. Fitchburg R. Co. (Mass.),[3] under the original Massachusetts act, as well as the common-law rule declared in Mackin v. Boston &c. R. Co. (Mass.).[4] These cases held that, when foreign cars were received by the defendant railroad company for the purpose of forwarding, the defendant was not held to the strict rule as to furnishing proper appliances for the work, but merely to the duty of inspection. Hence, if the defendant provided a sufficient number of competent inspectors, it was not liable for an injury caused by reason of a defect in the car's original construction or present condition, which was not discovered or remedied owing to the negligence of the inspector, or other person entrusted by the defendant with the duty of seeing that the cars were in proper condition.[5] The common employer was not liable at common law, because the inspector was a fellow servant with the injured

[1] Coffee v. New York &c. R. Co., 155 Mass. 21; 28 N. E. 1128.
[2] Rev. Laws Mass. 1902, ch. 106, § 71.
[3] 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425.
[4] 135 Mass. 201.
[5] See also, Kelly v. Abbot, 63 Wis. 307; 23 N. W. 890.

employee;[1] and the railroad company was not liable under the original statute, because a foreign car so used was not part of the "ways, works, or machinery connected with or used in the business of the employer." The act of 1893, ch. 359, therefore, gives an employee, who is injured by reason of a defect in a foreign car which is in possession of though not in use by the defendant, which defect the inspector negligently failed to discover or remedy, a right of action against his employer, if a railroad company, by expressly declaring that such a car "shall be considered a part of the ways, works, or machinery of the company using or having the same in possession." A car-inspector is obviously a person entrusted with the duty of seeing that the employer's ways, works, or machinery are in proper condition.[2]

§ 77. Railroad-track of connecting road.—The occasional use by the defendant railroad company of a connecting railroad's track, in delivering and taking cars in the course of business, does not make such track a part of the defendant's "ways" within the meaning of the Employers' Liability Act. The mere license to use such track does not give the defendant any control over it, nor impose any obligation upon the defendant to prevent defects in its condition.[3] Hence the defendant is not liable to its employee for an injury received by reason of a defect in that track.

Mr. Justice Morton, in delivering the court's opinion in Trask v. Old Colony R. Co. (Mass.),[4] says: "It may not be necessary, in order to render an employer liable for an injury occurring to an employee through a de-

[1] Dewey v. Detroit &c. R. Co., 97 Mich. 329; 52 N. W. 942; 56 N. W. 756; 37 Am. St. 348; Smoot v. Mobile &c. R. Co., 67 Ala. 13.

[2] Bowers v. Connecticut River R. Co., 162 Mass. 312; 38 N. E. 508.

[3] Trask v. Old Colony R. Co., 156 Mass. 298; 31 N. E. 6.

[4] 156 Mass. 298, 303; 31 N. E. 6.

fect in the ways, works or machinery, that they should belong to him, but it should at least appear that he has the control of them, and that they are used in his business, by his authority, express or implied.[1] Neither the employer nor any person in his service can be justly charged with negligence as to matters over which they have no control. The phrase 'connected with or used in the business of the employer'[2] can not be taken literally, but, when used in connection with ways, works and machinery, must be understood to mean ways, works and machinery connected with or used in the business of the employer by his authority and subject to his control."

§ 78. Ways, works, etc., used but not controlled by employer.—In Engel v. New York &c. R. Co. (Mass.)[3] it was held by a majority of the court that a track in the yard of a shipper of freight owned, maintained and repaired by him is no part of a railroad's "ways," though it is used by the railroad under a contract with the shipper for the delivery of freight in the yard. The case was decided upon the authority of Trask v. Old Colony R. Co. (Mass.).[4] Mr. Justice Knowlton, however, dissented, and distinguished the case from the Trask case upon the ground that in that case "the defendant had no control nor right of control, nor right to demand a safe condition of the track of the other railroad. But in the present case the track is furnished to the defendant as a place on which to do its regular business for pay; and the defendant has the control of it in the sense that it has a right to insist on its being kept in a safe condition for the transaction of the business which it has agreed to do."[5]

[1] Citing Roberts & Wallace Employers' Liability (3d ed.) 249, 250.

[2] Mass. Stats. 1887, ch. 270, § 1, cl. 1.

[3] 160 Mass. 260; 35 N. E. 547; 22 L. R. A. 283 (1893).

[4] 156 Mass. 298; 31 N. E. 6.

[5] Engel v. New York &c. R. Co., 160 Mass. 260, 266; 35 N. E. 547; 22 L. R. A. 283 (1893).

The court repudiates the idea that ownership of the track by the defendant is a necessary condition of its liability (page 261). After quoting the language of section 1, clause 1, the court adds: "These words mean that the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right."[1] The court, therefore, held that the railroad company was not liable to an employee for an injury caused by reason of a defect in the condition of the track, but intimated that there was a remedy against the shipper for negligence.[2]

For like reasons it has been decided that a staging which is not owned or controlled or constructed by the employer, and a defect in which he has no power to remedy, is no part of his ways or works.[3]

§ 79. Injury to employee of independent contractor.— The Massachusetts and Colorado acts make the employer liable for personal injuries sustained by the employees of an independent contractor, who is doing part of the employer's work, when the injuries are caused by reason of any defect in the condition of the ways, works, machinery, or plant owned or furnished by the employer, if such defect arose or had not been discovered or remedied through the negligence of the employer or some person entrusted by him with the duty of seeing that they were in proper condition.[4]

[1] Engel v. New York &c. R. Co., supra, at p. 261.

[2] Citing Finnegan v. Fall River Gas Co., 159 Mass. 311; 34 N. E. 523, and Osborne v. Morgan, 130 Mass. 102, 104; 39 Am. R. 437. But see Stetler v. Chicago &c. R. Co., 46 Wis. 497; 1 N. W. 112; Elkins v. Pennsylvania R. Co., 171 Pa. St. 121; 33 Atl. 74; Commonwealth v. Boston &c. R. Co., 126 Mass. 61.

[3] Riley v. Tucker, 179 Mass. 190; 60 N. E. 484 (1901).

[4] Colorado Laws 1893, ch. 77, § 3; Mass. Stat. 1887, ch. 270, § 4. Mass. Rev. Laws 1902, ch. 106, § 76, read as follows: "Section 76. If an employer enters into a contract, written or verbal, with an independent con-

The statutes of New York, of England, of Alabama and of Indiana do not give the employee of an independent contractor any remedy against the person who employs the independent contractor. Nor does the common law of these jurisdictions confer a right of action against such person for personal injuries caused to such employee.[1]

The purpose of section 4 of the Massachusetts act of 1887, ch. 270, relating to independent contractors, is "to enlarge the liability of the employer; otherwise it is meaningless. The inference from the section plainly is that the employer should be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery or plant furnished by the employer to the contractor, which has not been discovered or remedied through the negligence of the employer, or of some person entrusted by him with the duty of seeing that they were in proper condition."[2]

Independent of statute the rule is firmly established at common law that an employee of an independent contractor can not recover of the person employing such con-

tractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition."

[1] Kelly v. New York, 11 N. Y. 432; Scarborough v. Alabama &c. R. Co., 94 Ala. 497; 10 So. 316; Rome &c. R. Co. v. Chasteen, 88 Ala. 591; 7 So. 94; Vincennes Water Co. v. White, 124 Ind. 376; 24 N. E. 747; Johnson v. Lindsay, 23 Q. B. D. 508; (1891) A. C. 371; Cameron v. Nystrom, (1893) A. C. 308.

[2] Per Morton, J., for the court in Toomey v. Donovan, 158 Mass. 232, 236; 33 N. E. 396.

tractor for a personal injury caused by the negligence of the contractor or of his employees.[1]

§ 80. Same—Contractor may act in another capacity. —The same person may act both in the capacity of an independent contractor and of a person entrusted by the employer with the duty of seeing that the ways, works, machinery, or plant owned or furnished by the employer are in proper condition. The two capacities are not inconsistent. "One person may sustain different relations to another as well as different relations to different persons." If the person entrusted with this duty by the employer is negligent in its discharge, the employer is not relieved of liability by proof that such person is also an independent contractor, or subcontractor, who hired the plaintiff and had power to discharge him and to control his work.[2]

[1] Harkins v. Standard Sugar Refinery, 122 Mass. 400; Kansas Central R. Co. v. Fitzsimmons, 18 Kan. 34; Knight v. Fox, 5 Exch. 721; Boswell v. Laird, 8 Cal. 469; Rome &c. R. Co. v. Chasteen, 88 Ala. 591; 7 So. 94; Scarborough v. Alabama &c. R. Co., 94 Ala. 497; 10 So. 316; McCafferty v. Spuyten Duyvil &c. R. Co., 61 N. Y. 178; 19 Am. R. 267; Vincennes Water Co. v. White, 124 Ind. 376; 24 N. E. 747; Hughes v. Cincinnati &c. R. Co., 39 Ohio St. 461.

[2] Toomey v. Donovan, 158 Mass. 232, 236; 33 N. E. 396.

CHAPTER IV.

NEGLIGENCE OF SUPERINTENDENT.

SECTION

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100. That superintendent is a careful workman is no defense.
101. Common employment under different employers.
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§ 81. Statutory provisions.—The Massachusetts act of 1887 gives a right of action to an employee who is injured "by reason of the negligence of any person in the service of the employer, entrusted with and exercising superintendence, whose sole or principal duty is that of superin-

tendence;"[1] and the act of 1894, chapter 499, enlarges the employee's right of action by adding the words, "or, in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer."[2]

The fifth section of the Massachusetts act of 1887 contains a qualification of this right of action in these words:

"An employee or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself, in the service of the employer, who had entrusted to him some general superintendence."

The Colorado act of 1893, chapter 77, is copied from the original Massachusetts act of 1887, chapter 270, upon this subject. The Colorado statute of March 28, 1901, abolishes the fellow-servant rule.[3]

The Alabama statute gives a right of action in section 2590 of the code of 1886 (code of 1896, § 1749):

"2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence.

"3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

[1] St. 1887, ch. 270, § 1, cl. 2.
[2] St. 1894, ch. 499, § 1; Rev. Laws 1902, ch. 106, § 71.
[3] See appendix.

"4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf."

The qualification upon this right reads as follows:

"But the master or employer is not liable under this section if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence."[1]

The New York act of 1902, chapter 600, by section 1, clause 2, makes the employer liable for personal injuries suffered by his employee:

"By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer."

By section 3 of the New York act of 1902, chapter 600, the right of action is thus limited:

"An employee, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of

[1] Ala. code 1886, § 2590; code 1896, § 1749.

the employer who had entrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employee."

82. Enlargement of employee's common-law rights.— This is an important enlargement of the rights of employees and of the liabilities of employers. It gives a right of action in many cases for the negligence of a superintendent, who at common law was deemed to be merely a fellow servant, for whose negligence the common employer was not liable. It restricts the defense of employers that the injury was caused by the negligence of a fellow servant.[1]

In Griffiths v. Dudley,[2] Field, J., says: "The Employers' Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The employer was, before the passing of the act, clearly liable where he himself was guilty of negligence. It is also clear now that, for the negligence of a fellow workman not coming within any of the classes of persons specified in the act, the employer is not liable. But before the passing of the act, Wilson v. Merry[3] had decided that, where the injury was caused through the negligence of a superior person in the employment, the workmen could recover no damages from their common employer. The object of the act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons belonging to the specified classes."

[1] Coffee v. New York &c. R. Co., 155 Mass. 21, 22; 28 N. E. 1128; O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 136; 32 N. E. 1119.

[2] 9 Q. B. D. 357, 362.

[3] L. R. 1. Sc. App. 326.

In Colorado, however, it was a part of the common law before the passage of the Employers' Liability Act of 1893, that an employer was liable to an employee for an injury caused by reason of the negligence of a person to whom the employer had delegated the duty of superintendence.[1]

Clause 2, section 1 of the Colorado act of 1893, relating to the negligence of a superintendent, therefore, did not extend the liability of employers, but was merely declaratory of common-law rights and liabilities. The act in no manner works to the prejudice of the common-law rights of employees, nor does it interfere with the enforcement of any right not created by the statute itself.[2]

In Denver &c. R. Co. v. Driscoll (Colo.)[3] a workman while riding down grade on a flat-car was injured by its collision with another car, owing to the brake being taken off of the first car, by order of the superintendent, who ordered the man in charge of the brake to take it off and "let her rip." The defense in this action at common law was that Manly, the superintendent, was plaintiff's fellow servant, for whose negligent order the common employer was not liable. The evidence showed that Manly had foremen and workmen under him, whom he had authority to employ and discharge, and that he had entire charge of the cars, tools and machinery as well as the men engaged in the work of extending the defendant's line of railroad. It was held that Manly was a representative or vice-principal, and not a fellow servant, and that the defendant was liable for the plaintiff's injuries caused by Manly's negligent order to remove the brake.

[1] Denver &c. R. Co. v. Driscoll, 12 Colo. 520; 21 Pac. 708; 13 Am. St. 243 (1889); Colorado &c. R. Co. v. O'Brien, 16 Colo. 219; 27 Pac. 701 (1891).

[2] Colorado Milling Co. v. Mitchell, 26 Colo. 284, 288; 58 Pac. 28 (1899).

[3] 12 Colo. 520; 21 Pac. 708; 13 Am. St. 243 (1889).

This Colorado rule is very like the rule of "superior servant," which prevails at common law in Ohio, Kentucky and California.[1]

§ 83. Common law respecting superintendent's negligence compared with Employers' Liability Acts.—In Massachusetts the rule has always been strictly enforced in common-law actions that the common employer is not liable to an employee for injuries sustained through the negligence of a superintendent or superior workman. The fact that the latter has control over the plaintiff is deemed immaterial.[2] Even when the injury is caused by the negligent order of the defendant's superintendent either to a third person or to the injured employee, the defendant is not liable at common law.[3]

An order or command given to one employee by a superior employee is held to be one of the risks assumed by the inferior employee because such an order or command is a "transitory act which the employer has no chance to supervise," says Mr. Justice Holmes in Kalleck v. Deering (Mass.).[4] "It is not like a permanent condition of land or machinery or the abiding incompetence of an employee."

In Rogers v. Ludlow Mfg. Co. (Mass.)[5] Mr. Justice Field for the court says: "It is settled in this common-

[1] Little Miami R. Co. v. Stevens, 20 Ohio 415; Louisville &c. R. Co. v. Collins, 2 Duv. (Ky.) 114; Brown v. Sennett, 68 Cal. 225; 9 Pac. 74; Railway Co. v. Ogden, 3 Colo. 499.

[2] Kalleck v. Deering, 161 Mass. 469; 37 N. E. 450; 42 Am. St. 421; Moody v. Hamilton Mfg. Co., 159 Mass. 70; 34 N. E. 185; 38 Am. St. 396; Zeigler v. Day, 123 Mass. 152; Floyd v. Sugden, 134 Mass. 563; Walker v. Boston &c. R. Co., 128 Mass. 8; McKinnon v. Norcross, 148 Mass. 533; 20 N. E. 183; 3 L. R. A. 320; Howard v. Hood, 155 Mass. 391; 29 N. E. 630; Cogan v. Burnham, 175 Mass. 391; 56 N. E. 585.

[3] Albro v. Agawam Canal Co., 6 Cush. (Mass.) 75; Flynn v. City of Salem, 134 Mass. 351; Benson v. Goodwin, 147 Mass. 237; 17 N. E. 517.

[4] 161 Mass. 469, 470; 37 N. E. 450; 42 Am. St. 421.

[5] 144 Mass. 198, 203; 11 N. E. 77.

wealth that all servants employed by the same master in a common service are fellow servants, whatever may be their grade or rank.'"[1]

In Kenney v. Shaw (Mass.),[2] an action at common law, a workman was injured while engaged in blasting at a quarry, by reason of the negligence of the defendant's superintendent. It was held that "the injury was caused by one of the risks of the employment which the plaintiff assumed," and that he could not therefore recover of the common employer. In the later case of Malcolm v. Fuller (Mass.),[3] under the Employers' Liability Act, upon similar facts, it was held that one object of the statute was to prevent the plaintiff from assuming the risk of a superintendent's negligence, and to make the common employer liable for such negligence, and that accordingly the plaintiff could recover.

In McGinty v. Athol Reservoir Co. (Mass.)[4] an employee was injured by the fall of a derrick, caused by the pulling up of the post to which one of the guy-ropes was fastened. The post had been set by another workman, under the direction of the defendant's superintendent. In an action at common law, it was held that the superintendent was a fellow servant with the plaintiff, for whose neg-

[1] This rule prevails also in the following jurisdictions: Brown v. Winona &c. R. Co., 27 Minn. 162; 6 N. W. 484; 38 Am. R. 285; Gonsoir v. Minneapolis &c. R. Co., 36 Minn. 385; 31 N. W. 515; Mobile &c. R. Co. v. Smith, 59 Ala. 245; Brodeur v. Valley Falls Co., 16 R. I. 448; 17 Atl. 54; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; 42 Am. R. 543; Blake v. Maine Central R. Co., 70 Me. 60; 35 Am. R. 297; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Wilson v. Merry, L. R. 1 Sc. App. 326; New England R. Co. v. Conroy, 175 U. S. 323; 20 S. Ct. 85 (1899) (overruling Chicago &c. R. Co. v. Ross, 112 U. S. 377; 5 S. Ct. 184); Baltimore &c. R. Co v. Baugh, 149 U. S. 368; 13 S. Ct. 914.

[2] 133 Mass. 501.

[3] 152 Mass. 160; 25 N. E. 83.

[4] 155 Mass. 183; 29 N. E. 510.

ligence the defendant was not liable. If the action had been under the Employers' Liability Act, the plaintiff could probably have recovered.

In Crowley v. Cutting (Mass.)[1] the plaintiff's hand was crushed by the fall of a heavy stone which was being hoisted under the order of one McDonald, the defendant's superintendent. The superintendent had ordered iron dogs to be put on the stone, and did not have holes drilled into the stone into which the points of the iron dogs could be inserted. When the stone had been hoisted only five or six inches the dogs slipped off of the stone, the stone fell, and as the plaintiff had his hand under the stone to steady it, it crushed his hand. It was held that this was such negligence on the part of the defendant's superintendent as to render the defendant liable under the Employers' Liability Act.

The Alabama rule at common law is thus stated by Mr. Justice Somerville for the court in Louisville &c. R. Co. v. Allen (Ala.)[2]: "It was the settled law in this state, prior to the act of February 12, 1885, establishing by statute a contrary rule, that the employer is not liable in damages for any injury suffered by a fellow servant by reason of the fault or negligence of another fellow servant or coemployee in the same general business, unless such employer was chargeable with want of due care in having employed incompetent or unskilful servants in the particular business in which the injury was received."[3]

In Mobile &c. R. Co. v. Smith (Ala.)[4] it was held that the general manager and superintendent of a railroad company was a fellow servant with a locomotive-fireman, within the meaning of this rule, and that therefore the

[1] 165 Mass. 436; 43 N. E. 197.

[2] 78 Ala. 494, 502.

[3] Citing Mobile &c. R. Co. v. Smith, 59 Ala. 245, 248; and Mobile &c. R. Co. v. Thomas, 42 Ala. 672.

[4] 59 Ala. 245.

common employer, the railroad company, was not liable to the fireman for an injury caused through the negligence of the general manager and superintendent.

In Postal Tel. Cable Co. v. Hulsey (Ala.)[1] the plaintiff was ordered by one Cobbs to chop down a tree in the work of constructing a telegraph-line for the defendant. Cobbs had authority to give orders and instructions to the plaintiff and other men engaged in this work. It was held that no action at common law could be maintained for Cobbs' negligence causing injury to the plaintiff,[2] but that Cobbs was a superintendent within the meaning of the Employers' Liability Act.

§ 84. Same—England, New York and Ohio.—In England, until the passage of the Employers' Liability Act of 1880, a like rule prevailed at common law.[3] In Howells v. Landore Steel Co.[4] a coal-miner was killed through the negligence of the manager of the defendant's mine by an explosion of fire-damp. It was held that the defendant was not liable. Cockburn, C. J., says on page 64: "Since the case of Wilson v. Merry,[5] in the house of lords, it is not open to dispute that, in general, the master is not liable to a servant for the negligence of a fellow servant, although he be the manager of the concern." Blackburn, J., says on pages 64, 65: "It is a rule of law that the master who employs a servant (not an agent) is responsible for the negligence of that servant in matters in which he is employed; but there is this exception, which has

[1] 115 Ala. 193; 22 So. 854 (1897).

[2] Citing Georgia Pac. R. Co. v. Davis, 92 Ala. 300; 9 So. 252; 25 Am. St. 47; Tyson v. South &c. R. Co., 61 Ala. 554; 32 Am. R. 8; Smoot v. Mobile &c. R. Co., 67 Ala. 13.

[3] Wilson v. Merry, L. R. 1 Sc. App. 326; Feltham v. England, L. R. 2 Q. B. 33.

[4] L. R. 10 Q. B. 62.

[5] L. R. 1 Sc. App. 326.

been established by a series of decisions, that with regard to a fellow servant the master is held not so responsible, because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering into his employment."

In New York, also, it was well established before the enactment of the Employers' Liability Act of 1902, chapter 600, that the common employer was not liable to an ordinary employee who was injured by reason of the negligence of any person in his service entrusted with and exercising superintendence whose sole or principal duty was that of superintendence, or in his absence, of an acting superintendent. Such negligence was regarded as a risk incident to the work, which the injured employee assumed upon entering the service.[1] The employer's liability did not depend upon the grade or rank of the negligent person, but upon the character of the act causing the damage.

In Ohio, however, the rule generally recognized at common law has been repudiated in a long line of ably-reasoned decisions, and the doctrine of "superior servant" established, by which a servant who is placed in control over another servant is not considered a fellow servant, and the common employer is liable to the latter for an injury caused through the negligence of the former.[2]

[1] Crispin v. Babbitt, 81 N. Y. 516; 37 Am. R. 521; Cullen v. Norton, 126 N. Y. 1; 26 N. E. 905; Schulz v. Rohe, 149 N. Y. 132; 43 N. E. 420 (1896); Perry v. Rogers, 157 N. Y. 251; 51 N. E. 1021.

[2] Little Miami R. Co. v. Stevens, 20 Ohio 415; Cleveland &c. R. Co. v. Keary, 3 Ohio St. 201; Mad River &c. R. Co. v. Barber, 5 Ohio St. 541; Whaalan v. Mad River &c. R. Co., 8 Ohio St. 249; Pittsburgh &c. R. Co. v. Devinney, 17 Ohio St. 197; Berea Stone Co. v. Kraft, 31 Ohio St. 287; 27 Am. R. 510; Lake Shore &c. R. Co. v. Lavalley, 36 Ohio St. 221. The Kentucky rule is very like the Ohio rule: Louisville &c. R. Co. v. Collins, 2 Duv. (Ky.) 114. In Georgia the master is held liable for the negligence of a quasi-master: Atlanta Cotton Co. v. Speer, 69 Ga. 137; Taylor v. Georgia Marble Co., 99 Ga. 512; 27 S. E. 768; 59 Am. R. 238 (1896).

Rogers v. Ludlow Mfg. Co. (Mass.)[1] contains a concise statement of the views of different courts upon this question at common law by Mr. Justice Field, as follows: "As a corporation must act by natural persons, and as all large corporations carry on their business by means of servants of different grades, it is manifest that, if it is held that these are all fellow servants, and that the corporation can delegate the whole duty of hiring and superintending its servants, and of providing its machinery and of keeping it in repair, to one or more principal servants, such as superintendents or managers, the corporation may escape all responsibility for injuries caused by defective machinery, except in the few cases where it can be shown that these principal servants were incompetent, or that the directors of the corporation, or its principal officers, knew that the subordinate servants were incompetent, or that the machinery was defective. To avoid this result, some courts have held that superintendents or managers are not fellow servants with the men employed to work under them, or that servants employed in one department of the business are not fellow servants with those employed in another. Other courts have held that they are all fellow servants, but that the master can not avoid his obligation to see to it that reasonable care shall be exercised in procuring suitable machinery, in keeping it in repair, and in hiring and retaining competent servants, by employing a servant to do these things for him, and that if he does employ a servant for this purpose, and the servant does not use due care, the master is responsible."

In Illinois the doctrine of vice-principal has been extended so as to render an employer liable to his employee for the negligence of an employee in charge and control

[1] 144 Mass. 198, 201, 202; 11 N. E. 77; 59 Am. R. 68.

of workmen in carrying on some particular branch of the business.[1]

In Connecticut, by the statute of 1901, chapter 155, it is expressly provided with respect to a vice-principal's negligence by section 3, that "the default of a vice-principal in the performance of any duty imposed by law upon the master shall be the default of the master."

§ 85. Who are "superintendents" within the meaning of the statute.—In charging the jury in Malcolm v. Fuller (Mass.),[2] Mr. Justice Hammond thus defined a superintendent within the meaning of the Employers' Liability Act: "A superintendent is a man having the control, with the power of authority. That is to say, when he speaks the workmen are to obey, not because he advises them, or requests them, or hopes they will, but because by virtue of his position they have agreed to obey him. That is the nature of his authority. He is entitled to obedience. Suppose two or three men go to do a job of work, and, by reason of the greater experience of one, the others yield to his opinions and views, not because they are obliged to —they may act upon their own opinions and views—but because on the whole they think he knows best about it, and are willing to follow his advice; and he speaks to them, not by authority, but as a man engaged in the same employment, and in the way of advice or suggestion. That is not superintendence, because it lacks the element of authority. The superintendent is entitled to be obeyed as long as the man is in the employ of the master; and in the last illustration which I have given you the suggestion is complied with, not in the way of obedience, but

[1] Wenona Coal Co. v. Holmquist, 152 Ill. 581; 38 N. E. 946; Fraser v. Schroeder, 163 Ill. 459; 45 N. E. 288 (1896).

[2] 152 Mass. 160, 163; 25 N. E. 83.

because the men are convinced that it is well to do the work in the way suggested. You must be satisfied that in so far as Stewart was at work at the time with the plaintiff it was the plaintiff's duty to obey Stewart, on the ground that Stewart had the authority to say what the plaintiff should do and to tell him to do it, and that by virtue of the plaintiff's contract with the master he had agreed to obey Stewart, and did what he did as a matter of obedience to Stewart, because under the contract with the master he had agreed to obey him. There must be the element of authority on the part of the superintendent in order that it shall be superintendence within the meaning of the act; and the man entrusted with such authority,—that is, with the authority to give an order, not to offer a suggestion or advice, but authority to give an order under such circumstances that by the contract the servant agrees to comply with the order,—is a superintendent."

In Prendible v. Connecticut River Mfg. Co. (Mass.)[1] the plaintiff was injured by the negligence of one Campbell. The evidence for the plaintiff was that Campbell was the foreman of a gang of workmen engaged in piling wood for the defendant in the yard of its sawmill; that he sometimes worked with his hands, but worked when he pleased and only at what he pleased; that even when he was at work he was also overseeing the men; that he placed the men at work; and that he hired workmen at different times. Two of the defendant's witnesses also testified that he had general authority over the gang of workmen. It was held that the jury was warranted in finding that Campbell's principal duty was that of superintendence, within the meaning of the statute, and that the common employer was liable for his negligence to the plaintiff. At common law, Campbell would have been

[1] 160 Mass. 131; 35 N. E. 675.

merely a fellow servant with the plaintiff, for whose negligence the defendant would not have been liable.[1]

In Davis v. New York &c. R. Co. (Mass.)[2] a foreman of a gang of workmen engaged in track-repairing was held to be a person entrusted with and exercising superintendence, for whose negligence in failing to warn one of the workmen of the approach of a train the common employer was liable under the act. At common law such a foreman was considered a fellow workman, for whose negligence the common employer was not liable.[3]

A foreman in charge of a gang of seven men employed in pile-driving, who has power to employ and dismiss men, and who does not work with his hands, but directs the men, is a superintendent within the meaning of the Massachusetts act, although there is a general superintendent over him in the defendant's service.[4]

In Mahoney v. New York &c. R. Co. (Mass.)[5] it was held that the jury would be justified in finding that the principal duty of a person who was section foreman of a gang of five men in the employ of a railroad corporation, and under whose directions the plaintiff was working at the time of the injury, was that of superintendence within the Massachusetts act of 1887, chapter 270.

The fact that an employee does some slight manual labor does not prevent him from being a superintendent within the meaning of the Massachusetts Employers' Liability Act.[6] The man who was held to be a superintendent in the case just cited was known as a "foreman" and

[1] McGuerty v. Hale, 161 Mass. 51, 54; 36 N. E. 682; Zeigler v. Day, 123 Mass. 152.

[2] 159 Mass. 532; 34 N. E. 1070.

[3] Clifford v. Old Colony R. Co., 141 Mass. 564; 6 N. E. 751.

[4] McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007.

[5] 160 Mass. 573; 36 N. E. 588.

[6] Crowley v. Cutting, 165 Mass. 436; 43 N. E. 197.

had charge of a gang of men occupied in lowering stones into a trench by means of a derrick, and he worked under the superintendence of another employee who had the title of "general superintendent."

In Knight v. Overman Wheel Co. (Mass.)[1] one Kidder was the defendant's superintendent, and he instructed one Freeman to have certain shafting taken down, and Freeman then took entire charge of the work. Freeman was a foreman in charge of a gang, of which the plaintiff's intestate was a member. While the shafting was being lowered it fell upon the plaintiff's intestate and caused his death. There was evidence that the accident was due to leaving the belt on the pulley while the shafting was being taken down, that this caused a side strain, and that Freeman used only one chain-fall in the middle of the shafting, instead of using two falls, one attached to each end of the shafting. The chain which held the shafting was fastened to the chain-fall by a cat's-paw hitch, which gave way when the shafting fell. It was held that this evidence warranted the jury in finding that Freeman was an acting superintendent, and was negligent within the meaning of the Employers' Liability Act.

§ 86. Who are not "superintendents" within the meaning of the statute.—The statute, however, does not wholly abolish the defense that the injury was caused by the negligence of a fellow servant, but merely restricts it. There are still many cases in which this defense is available to the common employer in actions under the statute.[2]

In O'Connor v. Neal (Mass.)[3] Mr. Justice Morton, for the court, says: "The statute [Employers' Liability Act]

[1] 174 Mass. 455; 54 N. E. 890.

[2] Brittain v. West End St. R. Co., 168 Mass. 10; 46 N. E. 111 (1897); Gorman v. Woodbury, 173 Mass. 180; 53 N. E. 373.

[3] 153 Mass. 281, 284; 26 N. E. 857.

does not apply to a mere laborer working under or with others, even though it may be a part of his duty at some particular moment in the progress of the work to look after and attend to certain instrumentalities." In this case a mason was injured through the negligence of an ordinary workman in placing one end of a staging unevenly on the floor, so that it tipped when the plaintiff stepped upon it, and caused him to fall. It was held that the workman was a fellow servant of the plaintiff, for whose negligence their common employer was not liable to the plaintiff, either at common law or under the statute.

In Alabama the rule has been thus stated by Mr. Chief Justice Stone: "To be actionable under that part of the statute which controls this case,[1] the injury must be caused by the negligence of some person in the service or employment of the master or employer, 'who has superintendence entrusted to him, while in the exercise of such superintendence.' To hold the master or employer liable under this provision, the negligence must be that of some agent or employee who is in the exercise of superintendence, and to whose negligence in such exercise the disaster is traced. To hold otherwise would be to fasten liability on the principal to the employee for that which is at most the negligence of a fellow servant having no greater power or authority than the servant who complains of the injury. This the statute does not authorize."[2]

In O'Brien v. Rideout (Mass.)[3] a man who had worked upon a circular saw six or seven times, and had been hired as a common laborer, was set to work upon the saw by the defendant's foreman. The plaintiff testified that this

[1] Ala. code 1886, § 2590 (code 1896, § 1749), subd. 2.
[2] City Council &c. v. Harris, 101 Ala. 564, 569, 570; 14 So. 357, 358.
[3] 161 Mass. 170; 36 N. E. 792.

foreman "kept himself at work pretty much all the time in getting out lumber, or piling it up, or arranging it, and in operating saws." It was held that such evidence would not justify a finding that the foreman was a person whose sole or principal duty was that of superintendence within the terms of the Massachusetts statute; and that the foreman was merely a fellow servant with the plaintiff, for whose negligence the defendant was not liable, either at common law or under the Employers' Liability Act.

§ 87. Same—"Sole or principal" duty.—Evidence that an employee exercised some acts of superintendence within a narrow scope of employment will not warrant a finding that his "sole or principal" duty was that of superintendence, as required by the Massachusetts statute of 1887.

In Dowd v. Boston &c. R. Co. (Mass.)[1] the plaintiff was injured by the negligence of one McDonald. It appeared that McDonald, in the absence of the superintendent and foreman, gave directions to the plaintiff and to other workmen, but that he worked with his hands and drew the same wages as the plaintiff and the ordinary workmen, and that he received orders from the foreman and from the general superintendent. It was held that a verdict was properly ordered for the defendant, as the evidence was not sufficient to justify a finding that McDonald's "sole or principal" duty was that of superintendence.[2]

In O'Neil v. O'Leary (Mass.)[3] the question was whether "the sole or principal duty" of one McDonald was that of superintendence. It appeared that he was entrusted

[1] 162 Mass. 185; 38 N. E. 440.

[2] See also, Shepard v. Boston &c. R. Co., 158 Mass. 174; 33 N. E. 508. The injury in Dowd v. Boston &c. R. Co., supra, probably occurred before the passage of St. 1894, ch. 499, § 1, imposing a liability for the negligence of an acting superintendent.

[3] 164 Mass. 387; 41 N. E. 662.

with, and was exercising the duty of, superintending certain blasting operations, by one of which the plaintiff was injured. But the undisputed evidence showed that McDonald also worked with his own hands in attending to the fire under the steam-boiler, in sharpening all the tools used by the workmen, in charging the drill-holes and in clearing them out, and in other acts of manual labor, which altogether occupied most of his time. It was held by a majority of the court that this evidence would not warrant a finding that McDonald's "sole or principal" duty was that of superintendence, and that a verdict should have been ordered for the defendant. In the opinion, by Mr. Justice Lathrop, it is said on pages 390, 391: "In a sense it is undoubtedly true that superintendence is more important than manual labor, and so, if superintendence is entrusted to a man who also works with his hands, it may be said that his principal duty is that of superintendence. But if the statute had intended that every person exercising superintendence should not be considered a fellow servant with a person injured, there would have been no need of the words 'whose sole or principal duty is that of superintendence.' These words must have a reasonable interpretation given to them; and a majority of the court is of opinion that it can not be said of a person who works at manual labor, to the extent shown in this case, that his principal duty is that of superintendence."

A like rule prevails under the English act. In Kellard v. Rooke[1] the plaintiff was injured through the negligence of one Bodfield in failing to notify him that a bale of wool was about to be dropped down into the hold of a vessel where the plaintiff was at work. Bodfield was the foreman of a gang of laborers among whom the plaintiff worked. The defendant generally superintended such

[1] 21 Q. B. D. 367.

work in person, but, as he was temporarily absent, Bodfield, who worked with his hands on deck, was authorized to warn the men below when the bales were ready to drop by calling out, "Stand from under." It was held that Bodfield was not a superintendent within the meaning of the act, and that a nonsuit was properly ordered.

§ 88. Same—Charge or control does not render one a superintendent.—The fact that the negligent employee has the charge or control of the ways, works, machinery, or plant does not make him a superintendent within the meaning of these clauses.[1] In this respect the employer's liability differs materially from that of a railroad employer.[2]

In Shaffers v. General Steam Navigation Co.[3] the plaintiff, while working in the hold of a vessel, was hit by a sack of corn, which fell down the hatchway through the negligence of one Jones. The bags were lowered into the hold of the ship by means of a crane, and it was Jones' duty to guide the beam of the crane by a guy-rope, and to give directions to the man working the crane when to lower and when to hoist. At the time of the accident, Jones failed to check the swing of the crane's beam, in consequence of which the sacks struck the combing of the hatchway, were thrown out of the sling, and fell down the hatchway and broke the plaintiff's leg. It was contended that, as Jones had the charge of the crane, the jury would be justified in finding that he was a super-

[1] Shaffers v. General Steam Nav. Co., 10 Q. B. D. 356; Kellard v. Rooke, 19 Q. B. D. 585; 21 Q. B. D. 367; Roseback v. Ætna Mills, 158 Mass. 379; 33 N. E. 577; Brittain v. West End St. R. Co., 168 Mass. 10; 46 N. E. 111 (1897); Dantzler v. De Bardeleben Coal Co., 101 Ala. 309; 14 So. 10; 22 L. R. A. 361.

[2] See §§ 110, 119, post, on the liability of railroad companies to their employees for the negligence of persons in the charge or control of certain railroad appliances.

[3] 10 Q. B. D. 356.

intendent within the meaning of the act, but the court held the contrary and nonsuited the plaintiff.

In Roseback v. Ætna Mills (Mass.)[1] a loom-fixer was injured by the starting up of a loom by the weaver. He had been notified to fix a slight defect in the loom, and while in the act of fixing it the weaver started the loom. The weaver had operating charge and control of the loom, and when it got out of repair it was her duty to notify the loom-fixer to put it in order. The plaintiff contended that the weaver was a person "entrusted with and exercising superintendence," etc., within the Employers' Liability Act,[2] because she had the charge and control of the loom. But the court held that she was no more than the plaintiff's fellow servant, and that he could not recover of their common employer under the statute.

In Dantzler v. De Bardeleben Coal Co. (Ala.)[3] one McKay was killed while inside a blowing-cylinder or tub, repairing it, through the negligence of one Gould in failing to keep the blowing-engine disconnected with the steam-supply. Gould was an engineer, and had charge of five blowing-engines, including the one in which McKay was killed. He had the aid of a helper, who worked under him, but he operated the machines with his own hands, as directed by persons superior to him in the service. In an action under the statute by McKay's personal representative, it was held that Gould was not a superintendent within the meaning of the act, but was merely a fellow servant with McKay, for whose negligence the common employer was not liable.

Other cases under the statute, in which it was held that

[1] 158 Mass. 379; 33 N. E. 579.

[2] This clause of the act is not so broad as that relating to railroads, which gives a right of action for the negligence of any person who has "the charge or control of any signal, switch, locomotive-engine, or train upon a railroad:" Rev. laws 1902, ch. 106, § 71.

[3] 101 Ala. 309; 14 So. 10; 22 L. R. A. 361.

the plaintiff could not recover because his injury was caused by the negligence of his fellow servant, are cited in the note.[1]

§ 89. Negligence of employer and superintendent.—In an action to recover damages for the negligence of a superintendent under the statute, the employer can not escape liability by showing that his own act contributed to the injury. In Connolly v. City of Waltham (Mass.)[2] a laborer employed upon the defendant's water-works was injured by the caving in of a trench while he was at work upon it. The defendant's superintendent was negligent in failing to sheet and brace the trench, and in permitting earth to be piled upon the bank; but the defendant contended that, inasmuch as it had not furnished its superintendent with materials for bracing the trench, he was not negligent in failing to brace it, and that therefore it was not liable on a count alleging negligence of the superintendent. But the court held that this was too narrow a view of the case; that, if the superintendent "knew, or had reason to know, that there was danger of the caving in of the trench, and had no materials for bracing it, and no power to procure them, due care required him to stop the work until suitable materials were furnished; and it was personal negligence in his work of superintendence to allow the digging to go on before the necessary materials were procured. For such negligence of a superintendent the principal is answerable, and can not escape liability by showing that it was by his own act, and not by the fault of the superintendent, that suitable materials were wanting." Per Barker, J., page 370.

[1] Ashley v. Hart, 147 Mass. 573; 18 N. E. 416; 1 L. R. A. 355; Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 L. R. A. 425; Shepard v. Boston &c. R. Co., 158 Mass. 174; 33 N. E. 508.

[2] 156 Mass. 368; 31 N. E. 302.

§ 90. "Superintendents" under the New York Employers' Liability Act of 1902.—In Perry v. Rogers (N.Y.)[1] it was held that a foreman in charge of a large number of men who were engaged in blasting a ledge of rock was a fellow servant, for whose negligence the common employer was not liable to an ordinary laborer in setting him to work in a dangerous place without giving him warning of the danger.[2] Since the passage of the New York Employers' Liability Act such a foreman would probably be deemed a superintendent or an acting superintendent.

In Crispin v. Babbitt (N. Y.)[3] a laborer was injured in the iron-works of the defendant by the negligent act of the defendant's general superintendent or manager in letting on steam, which started a fly-wheel and threw the plaintiff on to the gearing-wheels. It was held, as matter of law for the court, that the defendant was not liable, because at common law the employer's liability does not depend upon the grade or rank of the negligent employee, however high, but upon the character of the act, the performance of which occasions the injury. Such a person would be a "superintendent," within the meaning of the New York Employers' Liability Act of 1902.

In Wooden v. Western New York &c. R. Co. (N. Y.)[4] a brakeman was killed in a wreck of the train, due to its rapid and uncontrolled descent down a steep grade. The plaintiff claimed that the train was too heavy to take down this grade, and that the conductor was negligent in attempting to make the descent without taking off some of

[1] 157 N. Y. 251; 51 N. E. 1021.

[2] See also, Cullen v. Norton, 126 N. Y. 1; 26 N. E. 905 (quarry-blasting under foreman); Loughlin v. State, 105 N. Y. 159; 11 N. E. 371 (loading boat under captain).

[3] 81 N. Y. 516; 37 Am. R. 521.

[4] 147 N. Y. 508; 42 N. E. 199.

the cars, as was customary under a rule of the company when there was a heavy train. It was held that the conductor and brakeman were fellow servants,[1] and that even if the conductor was negligent, the common employer was not liable therefor. Under the act of 1902 the conductor would seem to be a "superintendent," with respect to a brakeman on the same train.

§ 91. What is negligence of superintendent — Alabama cases.—A superintendent's negligence may consist in knowingly allowing the employer's ways, works, machinery, or plant to be and remain in a defective condition. Thus, in Seaboard Mfg. Co. v. Woodson (Ala.),[2] a locomotive-fireman was injured by the starting of the engine while he was underneath it oiling and cleaning it. The defect which caused the engine to start was that the throttle-valve leaked, which allowed the steam to pass through into the cylinders, and thus caused the engine to move off without notice to the plaintiff. One count alleged that the plaintiff was injured by reason of the negligence of the defendant's foreman, who was entrusted by the defendant with the exercise of superintendence over the plaintiff, said railroad, its engine, and cars; that the negligence of said foreman consisted in knowingly allowing said engine to be and remain in a defective condition; and that the defect was a leaky throttle-valve, etc. On demurrer it was held that this count stated a good cause of action under the second subdivision of section 2590 of the Alabama code of 1886.[3] Mr. Justice Walker, for the court, says on page 148: "Here there is an explicit averment of the negligence of a person entrusted with a superintendence by the employer; it is shown that he was guilty of such negligence whilst in the exercise of such

[1] See also, Slater v. Jewett, 85 N. Y. 61; 29 Am. R. 627; Sherman v. Rochester &c. R. Co., 17 N. Y. 153.

[2] 94 Ala. 143; 10 So. 87.

[3] Code 1896, § 1749.

superintendence, and that the injury was caused by reason of the omission of duty which was described as negligent. These averments brought the charge within the terms of the statute, and were sufficiently explicit."

It seems that knowledge of the defect by the defendant's superintendent is not essential to render the employer liable. In an action under the first clause of section 2590[1] for an injury caused by a defective brake on a railroad-car, it was held that the plaintiff need not allege or prove knowledge by the defendant of the defect in the brake.[2]

The act of a yardmaster of a railroad company in placing a car on a side-track so near to a main track as to knock a brakeman off a train on the latter track, while he is in the ordinary discharge of his duty, is actionable negligence for which the common employer is liable under the superintendence clause of the Alabama statute.[3]

The act and omission of the superintendent in charge of the construction of a railroad-bridge, in placing certain heavy timbers upright and allowing them to stand upright unsecured, are negligence for which the employer is liable to an employee who is injured by the fall of the timbers.[4]

"It is the duty of a superintendent to do what an ordinarily careful and prudent man would do under the same circumstances," says Chief Justice McClellan, "and the employer is liable if he fail to do this and injury results to an employee."[5] It was accordingly held in this action under the Employers' Liability Act that the fact that the defendant's superintendent of a coal mine was excitable and lost his head when the mine took fire, was no defense for the common employer.

[1] § 1749, code 1896.
[2] Louisville &c. R. Co. v. Coulton, 86 Ala. 129; 5 So. 458.
[3] Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88.
[4] Collier v. Coggins, 103 Ala. 281; 15 So. 578.
[5] Bessemer Land &c. Co. v. Campbell, 121 Ala. 50, 60; 25 So. 793 (1898).

In North Birmingham St. R. Co. v. Wright (Ala.)[1] an engineer, while driving a dummy-engine, leaned out of the cab window to see what was the matter with the engine, and was struck by a trolley-pole standing twenty-three inches from the window. It was his second trip over the line, and he testified that he had no knowledge of the existence of these poles—four in number and one hundred feet apart—and he claimed that the superintendent's failure to warn him of these poles was negligence. The plaintiff obtained judgment in the lower court, but the supreme court reversed the judgment for the reason that the failure to warn the plaintiff of such a remote danger was not negligence.[2]

In Southern R. Co. v. Shields (Ala.)[3] it was held to be negligence on the part of the defendant's superintendent to order an inexperienced man to stop or scotch a car running down grade by inserting a crowbar under the wheels, and a verdict for the plaintiff was sustained.

§ 92. Same—Massachusetts cases.—A superintendent's negligence may also consist in the failure to take proper precautions to protect employees who are engaged in the process of constructing the defendant's ways, works, machinery or plant.

In Hennessy v. City of Boston (Mass.)[4] the plaintiff, while digging a sewer-trench in the streets of Boston, was injured by the caving in of its sides. The trench was about thirty or forty feet long, twelve or thirteen feet deep, three feet wide at the top and about one and a half feet wide at the bottom. There was no bracing, except

[1] 130 Ala. —; 30 So. 360 (1901).

[2] Citing James v. Rapids Lumber Co., 50 La. An. 717; 23 So. 469; 44 L. R. A. 33 (1890), and note; Louisville &c. R. Co. v. Bouldin, 121 Ala. 197; 25 So. 903.

[3] 121 Ala. 460; 25 So. 811 (1899).

[4] 161 Mass. 502; 37 N. E. 668.

two blocks of earth about four feet wide and about twenty-five feet apart. There was a foreman in charge of the work, whose sole or principal duty was that of superintendence. In an action under the statute, it was held that there was evidence from which the jury might have found that the foreman was guilty of negligence, and that the presiding judge erred in ordering a verdict for the defendant.[1]

In O'Keefe v. Brownell (Mass.)[2] a workman engaged in labor upon a schoolhouse in process of erection was killed by a heavy truck falling upon his head through an opening in the floor above him. The truck was a movable tool designed for rolling loads from one part of the same floor to another. When not in use it could be easily blocked by nails or bits of wood suitable for cleats; but when in use in this way no cleats, of course, could be used without destroying its usefulness. While stationary and in use by a fellow workman in landing heavy planks, the truck fell through an opening in the floor and injured the plaintiff's intestate. In an action under the statute the plaintiff contended that the omission to use some appliance for blocking the truck was negligence of a superintendent, or was a want of superintendence on the employer's part, and also that the absence of blocking-appliances constituted a defect in the condition of the defendant's machinery. But the court held that the employer was not liable upon either ground; that the omission to use a blocking-appliance at the time of the injury was the negligence of a fellow servant, and not of a superintendent, or of a want of superintendence; and that the

[1] If this action had not been under the statute, but at common law, the plaintiff could not have recovered of the defendant, because the foreman was merely a fellow servant of the plaintiff: Zeigler v. Day, 123 Mass. 152.

[2] 156 Mass. 131; 30 N. E. 479.

absence of such appliance as a permanent attachment to the truck was not a defect in the tool or machine.

The failure of a superintendent to discover that a ledge-stone had been left for two or three days on a staging in such a position as to be liable to fall from a slight jar, when its position could only be seen from above the staging, is not negligence for which the common employer is liable to a workman injured by the fall of the stone.[1] Nor is the common employer liable under the statute for the failure of his superintendent to warn the plaintiff of a danger or defect with which he (the plaintiff) was previously acquainted.[2]

The failure of a superintendent to see that a slater's stage is overloaded with slate which causes it to fall and injure the plaintiff while he is at work upon it is an act of superintendence within the meaning of the statute for which the employer may be liable to the injured employee.[3]

In Gagnon v. Seaconnet Mills (Mass.)[4] the plaintiff was injured by a long squared timber which was being hauled along a defective road, tipping over upon him while he was sitting upon it at the direction of the defendant's superintendent to hold it down. The timber rested upon its narrow side and upon a roller. The timber was loaded and was being moved under the personal direction of the superintendent. It was held that the evidence warranted a finding that the superintendent was negligent, and that the plaintiff was in the exercise of due care, and had not assumed the risk, although he had had many years' experience in farming, hauling stone, and logging.

[1] Carroll v. Willcutt, 163 Mass. 221; 39 N. E. 1016.
[2] Perry v. Old Colony R. Co., 164 Mass. 296; 41 N. E. 289.
[3] Reynolds v. Barnard, 168 Mass. 226; 46 N. E. 703.
[4] 165 Mass. 221; 43 N. E. 82.

§ 93. Negligence must be an act of superintendence.— In order to recover damages of an employer for the negligence of his superintendent, it must appear that the negligence occurred in the exercise of superintendence: it is not sufficient to show that the negligence occurred merely during the period of superintendence. The act complained of must be an act of superintendence; otherwise an action can not be maintained under the statute. A few illustrations on both sides of the line will render the distinction clear.

In McCauley v. Norcross (Mass.),[1] a workman engaged upon the second floor of a building in process of erection was injured by the fall of an iron beam upon him through an opening in the floor above. The beam, with several others, had been placed on the third floor, about three and a half feet from the opening, two or three days prior to the injury, and had been allowed to remain there. The defendant's superintendent, while walking about this floor, and in order to pass between the beams and a pile of planks, pushed the beam with his foot, whereupon it swung around upon the other beams and fell through the hole in the floor upon the plaintiff. In an action under the statute, it was held that the fact that it was the superintendent himself who pushed the beam was of no importance, because that was not an act of superintendence; but that the jury was warranted in finding a lack of proper superintendence, for which the defendant was liable, from the circumstance that the beams were allowed to remain in such a position for two or three days—a position in which a slight inadvertent push of the foot by a passer-by would send the beam through the opening.

The act of a foreman of a gang of workmen engaged in pile-driving, in giving the order to "hoist again" when the gypsy-fall was foul of the chocking-block, whereby

[1] 155 Mass. 584; 30 N. E. 464.

the hammer was released and the plaintiff injured, is an act of superintendence, for which the employer is liable under the Massachusetts act.[1] So also, allowing the gypsy-fall to be handled by a workman obviously intoxicated at the time, who allowed the fall to get foul of the block, is an act of superintendence within the meaning of that statute.[2]

In Fitzgerald v. Boston &c. R. Co. (Mass.)[3] the plaintiff was injured while stowing away hay in the defendant's hay-shed by the fall of a bale of hay upon him. It did not appear what caused the hay to fall, nor that the defendant's superintendent knew, or ought to have known, that the hay was liable to fall. In an action under the statute, it was held that there was no evidence to justify a finding that the superintendent was negligent, and that a verdict was properly ordered for the defendant. The reason assigned was that the negligence complained of did not occur in the exercise of superintendence, even if it occurred during the superintendence.

In Joseph v. George C. Whitney Co. (Mass.)[4] the plaintiff's hand was cut off by the closing of the jaws of an embossing-machine, which he was hired to operate. The plaintiff properly placed his hand between the jaws of this machine when the power was turned off, and the power was accidently turned on and the machine started by the shifter being touched or hit by the superintendent, while he was instructing another workman at another machine, and was standing between the two machines with his back to the plaintiff's. It was held that the employer was not liable under the act, because the act of negligence was too remote from the duties of superintend-

[1] McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007.
[2] McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007.
[3] 156 Mass. 293; 31 N. E. 7.
[4] 177 Mass. 176; 58 N. E. 639.

ence. As stated by Chief Justice Holmes for the court (page 178): "The precise place in which Meyer [the superintendent] should be while giving his directions, the way in which he should stand or sit, and his care in managing his body in the place he selected, were too much the accident of his independent personality and too remote from the act of giving the orders for us to charge the defendant with the consequences of his neglect in that regard. The matter may be stated in a different form. If the motion of Meyer, which caused the injury, be regarded as part of an act of superintendence, the fact that he was superintending was in no way a necessary element in producing the injury. But we are of opinion that by a true construction of the statute the superintendence must contribute as such, and that when, as here, it had nothing to do with the injury qua superintendence, the case is not within the act."

The distinction between acts of superintendence and acts of non-superintendence is further illustrated by the cases cited in the foot-note.[1]

§ 94. Scope of superintendent's duties.—In order to hold an employer liable for the negligence of his superintendent, it must appear that his negligent act was performed in that part of the work in which he was employed to exercise superintendence. If his superintendence as such does not contribute to occasion the injury to the employee, the case is not within the statute, and the employer is not liable.[2] It is not necessary, however, that negligent superintendence should be the sole cause of the injury.[3]

[1] Flynn v. Boston Electric Light Co., 171 Mass. 395; 50 N. E. 937; Fleming v. Elston, 171 Mass. 187; 50 N. E. 531; Whittaker v. Bent, 167 Mass. 588; 46 N. E. 121; Sullivan v. Thorndike Co., 175 Mass. 41; 55 N. E. 472.

[2] Shea v. Wellington, 163 Mass. 364; 40 N. E. 173; Louisville &c. R. Co. v. Bouldin, 110 Ala. 185; 20 So. 325.

[3] O'Brien v. Look, 171 Mass. 36, 41; 50 N. E. 458.

In Shea v. Wellington (Mass.)[1] the plaintiff, while blasting in a quarry, was injured by an explosion of dynamite in a drill-hole which he was loading, caused, as he alleged, through the negligence of the defendant's superintendent, Watson, in furnishing him with a defective exploder. The plaintiff testified that, on the day of the accident, Watson handed him seven exploders to be used in loading seven holes, and that one of them he picked at with his finger-nail and said, "I guess that is all right;" that the plaintiff saw a seam in the copper covering of the exploder, through which he noticed a white substance. There was evidence from other witnesses to the effect that, if there was a seam in the exploder through which the fulminate of mercury could be seen, it would adequately account for the accident. The defendant bought his exploders ready-made from a reputable manufacturer. It was no part of Watson's duty to inspect exploders, nor had he ever done so with the defendant's knowledge and consent. It was held that the defendant was not bound to inspect the exploders before using them, and that, if Watson was negligent in not discovering the defect, his negligence was not within the scope of his duties as superintendent, and that the defendant was not liable.[2]

[1] 163 Mass. 364; 40 N. E. 173.

[2] The reasoning of the court is instructive, and parts of the opinion by Mr. Justice Knowlton are printed herewith: "The third count alleges negligence of the defendant's superintendent in furnishing for the plaintiff's use a defective exploder. We have already seen that the defendant owed the plaintiff no duty to have the exploders inspected by his superintendent, or by anybody else, in regard to their construction. Unless there was evidence which would have warranted the jury in finding that inspecting the exploders for defects in construction was a part of the business of superintendence in which the superintendent was negligent, it is of no consequence in this case whether he did or did not act carelessly in picking with his nail at the exploder, and then passing it to the plaintiff to be used, as the plaintiff testifies he did. There is evidence that he was the general superintendent at the works.

The rule that an employer is not liable under the Employers' Liability Act for his superintendent's negligence

Doubtless the general custody of the exploders and of all the other property there was involved in his superintendence, but is there any evidence that an inspection of them for defects in construction was a part of the duty which, as a superintendent, he was hired to perform? The admitted facts and undisputed evidence to which we have already referred make it almost certain that he was never hired to do such a duty. In order to hold an employer for positive acts of negligence on the part of his superintendent, if these facts [acts] relate to a matter in regard to which the employer has no duty to perform, it should be made clearly to appear that the employer has undertaken to do by his superintendent that which he was not called upon to do. An act done voluntarily by the superintendent in that field, without the direction or approval of the employer, would not be an act of superintendence: Fitzgerald v. Boston &c. R. Co., 156 Mass. 293; 31 N. E. 7; Cashman v. Chase, 156 Mass. 342; 31 N. E. 4. * * * Taking the testimony together, there is hardly more than a scintilla of evidence that Watson ever assumed to inspect these exploders to see whether they were safely and properly made. But if Watson assumed to do that, it being no part of the defendant's business to do it or to have it done, it can not affect the defendant unless it appears that it was done with the defendant's knowledge and consent, as a part of the work which, as superintendent, he was employed to do. There was no testimony that the defendant ever hired him to do it, or knew that he assumed to do it. If he saw the seam in the exploder, and if the jury might have found that as a prudent man he ought to have thought the exploder unfit for use by reason of the seam, his negligence in failing to say so to the plaintiff was only the negligence of a fellow servant, for which the defendant is not liable. There was no evidence that the determination of the question whether an exploder was unsafe by reason of an apparent defect in construction was within the scope of his employment as superintendent. He was not selected in reference to his qualifications to decide such a question. If he noticed a seeming defect in the mode of construction of an article which he was not expected to examine, and whose workmanship was outside of the field of his superintendence, his duty to speak of it to the plaintiff was no greater than that of any other workman of equal knowledge and experience who might have seen it. If he was guilty of negligence in that particular, his negligence was that of an ordinary employee, and not that of a superintendent. We are of opinion that the jury would not have been warranted in finding that the plaintiff suffered from any negligent act on the part of Watson done in that part of the work in which he was employed to exercise superintendence: Shea v. Wellington, 163 Mass. 364, 370, 372; 40 N. E. 173."

unless the negligent act was committed within the scope or course of his duties as superintendent is merely an application of the broader rule of agency relating to all relations of life. At common law this doctrine applies to actions brought by non-employees of the defendant,[1] as well as by his employees, for negligence of his servants or agents.

The common employer is not liable for the negligence of the plaintiff's coemployee when the negligent employee was at the time of injury acting without authority and outside the scope of his employment.[2]

§ 95. Superintendent doing work of common laborer. —Although the negligence causing the injury is that of a person "entrusted with and exercising superintendence" within the terms of the Massachusetts statute, still, if, at the time of and in doing the act complained of, he is merely doing the work of a common laborer, the employer is not liable. "The law recognizes that an employee may have two duties; that he may be a superintendent for some purposes, and also an ordinary workman, and that if negligent in the latter capacity, the employer is not answerable."[3]

[1] Brown v. Jarvis Engineering Co., 166 Mass. 75; 43 N. E. 1118; 55 Am. St. 382; 32 L. R. A. 605; Shattuck v. Bill, 142 Mass. 56; 7 N. E. 39; Nims v. Mount Hermon Boys' School, 160 Mass. 177; 35 N. E. 776; 39 Am. St. 467; 22 L. R. A. 364; Gibson v. International Trust Co., 177 Mass. 100; 58 N. E. 278; Perlstein v. American Ex. Co., 177 Mass. 530; 59 N. E. 194; McCarthy v. Timmins, 178 Mass. 378; 59 N. E. 1038; Isaacs v. Third Ave. R. Co., 47 N. Y. 122; Louisville &c. R. Co. v. Kendall, 138 Ind. 313, 315; 36 N. E. 415; 7 Am. R. 418; Wabash R. Co. v. Linton, 26 Ind. App. 596; 60 N. E. 313; Limpus v. London General Omnibus Co., 1 H. & C. 526.

[2] Bequette v. St. Louis &c. R. Co., 86 Mo. App. 601; Morris v. Brown, 111 N. Y. 318; 18 N. E. 722; 7 Am. St. 751 (1888); Eaton v. Delaware &c. R. Co., 57 N. Y. 382; Chicago &c. R. Co. v. Smith, 10 Kan. App. 162; 63 Pac. 294 (1901).

[3] Per Barker, J., in Cashman v. Chase, 156 Mass. 342, 344; 31 N. E.

For the above reason it was held that an employer was not liable for the negligence of his engineer, who raised a fall, which swung into the hold of a vessel and to which a hook was attached, when he was ordered to lower it, whereby the hook was pulled out of a workman's hands and struck the plaintiff. The engineer employed the men, showed them how to do the work, and discharged them. Upon these facts the court held that it might be competent for the jury to find that the engineer was to some extent a superintendent; but that, as he was acting merely as an ordinary workman at the time of his negligence, the plaintiff could not recover.[1]

The act of a superintendent in fetching and putting down a can of powder to be used in blasting is not an act of superintendence but of manual labor, and the employer is not liable for an injury caused by its being overturned and exploding, although it was negligent to leave the can where he did.[2]

If the accident be due to an improper method of doing the work, which method the superintendent has adopted and put into operation, the fact that the immediate act which injures the plaintiff is manual work, and is performed either by the superintendent or by an ordinary workman, does not relieve the employer from liability for the negligence of his superintendent under the Employers' Liability Act.[3]

At common law, however, an injury occasioned by an improper method of doing the work, approved by a person who would be a superintendent under the act, does not render the employer liable to his employee.[4]

4. See also, Shaffers v. General Steam Nav. Co., 10 Q. B. D. 356; Kellard v. Rooke, 19 Q. B. D. 585; 21 Q. B. D. 367.

[1] Cashman v. Chase, 156 Mass. 342; 31 N. E. 4.

[2] Riou v. Rockport Granite Co., 171 Mass. 162; 50 N. E. 525.

[3] O'Brien v. Look, 171 Mass. 36; 50 N. E. 458.

[4] Cogan v. Burnham, 175 Mass. 391; 56 N. E. 585. In this case a

When a superintendent has no business to meddle with a machine operated by the plaintiff, except in the capacity of superintendent, any meddling with it by him constitutes an act of superintendence within the meaning of the Employers' Liability Act.

In Roche v. Lowell Bleachery (Mass.)[1] the plaintiff ran a washing-machine, and while he was on another floor tightening the binders connected with his machine, the superintendent started his machine running, by reason of which the plaintiff was caught in the shafting and injured. It was held that the negligence consisted in setting the machine in motion at that particular time; that the act was equivalent to an order and its execution; that as the precise object of the superintendent's conception was improper, "the proxity between the brain that conceived and the subordinate ganglion that carried out the thought seems not to be a ground of exoneration." (Per Holmes, C. J.)

§ 96. Negligent order of superintendent.—The Employers' Liability Act protects employees from negligent orders as well as from negligent acts of superintendents performed within the scope of their duties. An employee does not assume the risk of injury arising from a negligent order of the employer's superintendent while exercising superintendence.[2]

Even a superintendent's failure to give an order which is required by the condition of affairs existing may amount to negligence and render his employer liable. Thus in Grimaldi v. Lane (Mass.)[3] the plaintiff was a workman

large trestle was being taken down as a whole instead of being separated and taken down in parts; and this improper method caused part of the trestle to fall upon the plaintiff, who was helping in the work.

[1] 182 Mass. —; 63 N. E. 943 (1902). See also, Ray v. Wallis, 51 J. P. 519.

[2] Cavagnaro v. Clark, 171 Mass. 359; 50 N. E. 542; Murphy v. City Coal Co., 172 Mass. 324; 52 N. E. 503; Green v. Smith, 169 Mass. 485; 48 N. E. 621; Eaves v. Atlantic Novelty Co., 176 Mass. 369; 57 N. E. 669.

[3] 177 Mass. 565; 59 N. E. 451.

in a quarry and was injured by the explosion of a dynamite cartridge. The plaintiff's work consisted of breaking stone, and had nothing to do with blasting. He discovered, however, that a blasting-hole loaded with dynamite cartridges had failed to explode, and informed the superintendent of the quarry of the fact, and the superintendent ordered another workman to unload the hole. This second workman attempted to perform this work by using an iron scraper, which was a dangerous instrument to use for this purpose, and the superintendent stayed at the hole watching the workman use the scraper for four or five minutes and left the vicinity without warning the plaintiff, who was working near, to move away. It was held that these facts warranted a finding that the superintendent was negligent toward the plaintiff and the defendant liable.

Where, however, the superintendent's words do not amount to an order to do the particular thing which causes the injury, but merely to a general direction to do certain work, the exact manner of doing which work is left to the plaintiff or to a coemployee, the plaintiff may be held, as a matter of law, to have assumed the risk, and therefore to be not entitled to recover against his employer. In Sullivan v. Thorndike Co. (Mass.)[1] the plaintiff was injured by the fall of a freight-elevator which he was employed to run in carrying materials in process of manufacture from one department to another in the defendant's mill. The elevator's fall was caused by overloading the elevator. The superintendent told a workman to put a certain truck containing this heavy load on to the elevator, and then told the plaintiff to take that load up-stairs. It appeared on cross-examination of the plaintiff that he was in the habit of taking orders from anybody in that room as to where the load should go and

[1] 175 Mass. 41; 55 N. E. 472.

where it should be delivered by him from the elevator. It was held that this evidence would not warrant the jury in finding that this direction was an act of superintendence, but was merely a general direction which might be given by a fellow servant in that department.

So, also, if the superintendent's words are said, not in the exercise of superintendence, but as one servant to a fellow servant, the doctrine of assumption of risk applies, and the employer is not liable. In Whittaker v. Bent (Mass.)[1] the plaintiff, who was a molder in the defendant's employ, was injured by an explosion in the mold caused by pouring melted iron into it while it was damp. It appeared that on the morning of the accident the molds had been set up by the defendant's superintendent, and when the plaintiff came to pour the melted iron into the mold he looked at the superintendent and asked if the molds were all right, and received the reply, "Yes, go ahead, Bob." The liability of the molds to be damp was well known, and the dampness of the molds could be ascertained only at the moment when they were set up. There was no personal obligation on the part of the defendant to have the molds inspected for dampness. The molds were small and numerous, the danger transitory, and any further inspection than that necessarily left to the plaintiff's fellow servants would have been impracticable, as said by Mr. Justice Holmes for the court. It was held that the answer, "Yes, go ahead, Bob," was not the order of a superintendent within the meaning of the Employers' Liability Act, but was merely the assurance in a customary colloquial form of a fellow workman who had inspected the molds that all was safe, and therefore the plaintiff could not recover.[2]

On the other hand, the employer may be liable under

[1] 167 Mass. 588; 46 N. E. 121.

[2] For other cases on this subject see post, § 247, and McClusky v. Garfield Co., 180 Mass. 115; 61 N. E. 804 (1901).

the act for the negligent order of his superintendent, although at the time of the plaintiff's injury the superintendent is performing manual labor. In Osborne v. Jackson,[1] the plaintiff, a bricklayer in defendant's employ, was working near a shoring while a scaffold was being taken down by others. The defendant's foreman, one Thomas, while holding one end of a plank, called to one Collier to take hold of the other end. Collier took hold of the plank, but was so far off that he could not hold it alone, and as soon as Thomas let go his end the plank slipped and knocked down the shoring, which fell upon the plaintiff and caused the injury complained of. It was held that the defendant was liable. Denman, J., says on page 620: "The decision in Shaffers v. General Steam Nav. Co.[2] was decided on grounds which do not apply here. The negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident. In the present case the foreman was generally superintending the work on which the plaintiff and Collier were employed. The foreman called to Collier, who was under his orders, to take the plank when it was impossible to do so safely; that was superintendence, and the judge might find, and has found, that it was negligence within the meaning of subsection 2. I think it was so, although Thomas was at the time supplying as a volunteer the place of another workman." Hawkins, J., says on page 621: "If Thomas had directed another to do what he did himself, he would surely have been negligent in the exercise of superintendence."

§ 97. **Temporary absence of superintendent.**—It is well settled that, when the ground of liability is the negligence of a superintendent, the negligence must occur not only during the period of superintendence, but also in the ex-

[1] 11 Q. B. D. 619.
[2] 10 Q. B. D. 356.

ercise of it.[1] The negligence, however, may consist in his temporary absence from his post of duty, and this is considered to be negligence in the exercise of superintendence within the rule of liability. In Lynch v. Allyn (Mass.)[2] the plaintiff was injured by the falling of a bank of earth upon him while he was undermining it, and during the temporary absence of the superintendent, whose duty it was to look after the bank and the men. The bank was not shored up in any way, and when the superintendent left the spot he failed to station any one there to give warning of the danger. It was held that it could not be ruled as matter of law that the superintendent was not negligent, and that it was a question for the jury to decide.

§ 98. Instructions upon matters of detail.—In the prosecution of work there are many matters of detail which devolve upon the common laborer and not upon the superintendent. In such matters the failure of the superintendent to give special instructions is not such negligence on his part as will render the employer liable to an employee who is injured through the negligence of a fellow servant. In Burns v. Washburn (Mass.)[3] a mason's tender was injured by a staging falling upon him. The immediate cause of its fall was the negligence of one of the masons in driving but one nail in the end of a board instead of several nails. The defendant's superintendent told the masons to build a certain piece of wall, leaving them to construct their stagings without instructions. The plaintiff claimed that this failure to instruct the masons how to build their stagings, and his absence during their

[1] Fitzgerald v. Boston &c. R. Co., 156 Mass. 293; 31 N. E. 7; Cashman v. Chase, 156 Mass. 342; 31 N. E. 4; ante, § 93.

[2] 160 Mass. 248; 35 N. E. 550.

[3] 160 Mass. 457; 36 N. E. 199.

building, was negligence of the superintendent within the meaning of the act, for which the employer was liable. But the court held that the plaintiff could not recover. In delivering the opinion of the court, Mr. Justice Lathrop says on page 458: "The mere fact that the superintendent gave no instructions as to the staging can not be said to be evidence of negligence on his part. No instructions were needed. The masons were accustomed to build their own stagings, and probably knew as much about the proper way of constructing them as the superintendent. Nor is the fact that the superintendent was not present while the staging was building of itself evidence of negligence on his part. A general superintendent of a building can not be expected to be present as every detail of the work is done."[1]

§ 99. Conflicting evidence as to whether person causing injury is a superintendent—Jury to decide.—If the plaintiff's evidence tends to show that the person whose negligence caused the plaintiff's injury is a superintendent within the meaning of the statute, and the evidence for the defendant tends to show that such person is a fellow servant, the question should be submitted to the jury for determination.[2] But where all the evidence in favor of the plaintiff fails to show that such person is a superintendent within the meaning of the statute, the presiding judge should so instruct the jury, and, if the plaintiff's case is founded solely on that ground, a verdict should be ordered for the defendant.[3]

The question whether a superior servant is a vice-principal or merely a fellow servant, is a question of law for the court to decide, when there is no conflict of evidence,

[1] Citing Fitzgerald v. Boston &c. R. Co., 156 Mass. 293; 31 N. E. 7.

[2] Malcolm v. Fuller, 152 Mass. 160; 25 N. E. 83; Geloneck v. Dean Steam Pump Co., 165 Mass. 202; 43 N. E. 85.

[3] O'Neil v. O'Leary, 164 Mass. 387; 41 N. E. 662.

and it is therefore erroneous for the judge to submit that question to the jury.[1] But when the evidence upon this point is conflicting, the question should be left to the jury.[2]

§ 100. That superintendent is a careful workman is no defense.—In an action under the statute for the negligence of a superintendent, it is no defense to show that he was a careful workman,[3] or that the defendant had exercised due care in selecting him. To hold otherwise would be a palpable evasion of the statute, and would render this clause of the act nugatory. The right of action is given for the negligent act of the superintendent.

§ 101. Common employment under different employers.—The mere fact that employees are engaged in labor upon the same piece of work does not make them fellow servants within the rule which exempts the employer from liability for negligence of his servants. To come within this rule, the employees must have the same employer. If they are servants of different masters, they are not fellow servants within this rule, and the employee of one master can recover damages of the other master for an injury caused by the negligence of the latter's servants.[4] In such case the injured employee can not be said to take upon himself the risk of negligence coming from the servant of another master. Nor has he any adequate means of guarding against such negligence. In the case

[1] Johnson v. Boston Tow-Boat Co., 135 Mass. 209; 46 Am. R. 458; McGinty v. Athol Reservoir Co., 155 Mass. 183, 187; 29 N. E. 510.

[2] Patnode v. Warren Cotton Mills, 157 Mass. 283, 287; 32 N. E. 161.

[3] Malcolm v. Fuller, 152 Mass. 160; 25 N. E. 83.

[4] Morgan v. Smith, 159 Mass. 570; 35 N. E. 101; Burrill v. Eddy, 160 Mass. 198; 35 N. E. 483; Johnson v. Lindsay, (1891) A. C. 371 (reversing Johnson v. Lindsay, 23 Q. B. D. 508); Cairns v. Clyde Trustees (1898), 25 Rettie 1021; Reilly v. Atlas Iron Co., 64 N. Y. St. 332; 31 N. Y. Supp. 618.

of a common employer, on the other hand, "each [employee] is an observer of the conduct of the others; can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require."[1]

§ 102. Injury to superior officer or other employee not under the superintendence of the negligent superintendent.—The fact that the injured employee is not subject to the orders or under the superintendence of the superintendent whose negligence causes the injury does not prevent a recovery under the Employers' Liability Act against the common employer.

In Kansas City &c. R. Co. v. Burton (Ala.),[2] a brakeman was injured through the negligence of a yardmaster in placing a car too near a track, by which the plaintiff, who was passing on a car upon another track, was knocked off. The defendant contended that, as the plaintiff was not under the superintendence of the yardmaster, the statute imposed no liability. But the court held the contrary, saying, through Mr. Justice McClellan, on page 246: "Under subsection 2, it is manifest, we think, the liability of the defendant is in no sense dependent upon the relations existing in the service between the negligent and the injured person. If the former has superintendence intrusted to him, and is negligent in the exercise of it to the injury of any 'servant or employee in the service or business of the master,' whatever be the relation inter se of the servants, the master is made liable therefor by the very terms of the statute. If a yardmaster, charged with the duty of keeping the tracks clear, should negli-

[1] Per Shaw, C. J., in Farwell v. Boston &c. R. Co., 4 Met. (Mass.) 49, 59; 38 Am. D. 339.

[2] 97 Ala. 240; 12 So. 88.

gently obstruct a track, and in consequence the president of the company should be injured in the service of the employer, the corporation, it can not be doubted that the latter would have to respond in damages."

§ 103. Employee liable to coemployee for negligence. —The rule, that an employee can not recover of the common employer for the negligence of a coemployee, does not bar the injured person of all remedy. He has the right at common law to sue his coemployee, and may recover a judgment for damages to the full extent of his injury.[1] The difficulty occurs in obtaining satisfaction of the judgment, as most employees are unable to pay large sums.

The Colorado Employers' Liability Act expressly declares upon this point that—

"If the injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a coemployee, the coemployee shall be equally liable under the provisions of this act with the employer, and may be made a party defendant in all actions brought to recover damages for such injury," etc.[2]

[1] Osborne v. Morgan, 130 Mass. 102 (overruling Albro v. Jacquith, 4 Gray (Mass.) 99); 64 Am. D. 56; Hinds v. Overacker, 66 Ind. 547; 32 Am. D. 114; Griffiths v. Wolfram, 22 Minn. 185; Swainson v. Northeastern R. Co., 3 Ex. D. 341; Winterbottom v. Wright, 10 M. & W. 109; Milligan v. Wedge, 12 Ad. & El. 737; Atkins v. Field, 89 Me. 281; 36 Atl. 375.

[2] 2 St. 1893, ch. 77, § 5.

CHAPTER V.

LIABILITY PECULIAR TO RAILROAD EMPLOYERS.

SECTION

104. Scope of chapter and statutory provisions.
105. "Train" defined.
106. "Locomotive-engine."
107. "Car."
108. "Upon a railroad."
109. Statutory defects in freight-cars, grab-irons and draw-bars — Blocking of frogs, switches, and guard-rails.
110. "Charge or control" for temporary purpose.
111. Person in charge or control of train.
112. Brakeman or other employee may have charge or control of a train.
113. Different views at common law concerning person in charge or control of train.
114. Who may have the charge or control of locomotive-engine.
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116. Person in charge or control of switch.
117. Negligence of person in charge or control of signal, switch, engine, car, etc.
118. Same—Alabama.
119. Negligence need not be in the performance of a duty which is personal to the employer.
120. Railroads operated by receivers.
121. Same—Prior leave of appointing court to sue.
122. Constitutionality — Discrimination against railroads.
123. Same.
124. Incompetent and negligent hospital surgeon.

§ 104. Scope of chapter and statutory provisions.—This chapter does not include all cases of liability of railroad companies under the acts, but merely those cases which are exceptional and peculiar to railroads. Other cases are discussed under their appropriate titles in other parts of the book.[1]

[1] See particularly, §§ 216, 217, post.

As applied to railroad companies, the defense of fellow service has been much further restricted by the Employers' Liability Acts than as applied to other employers. As we have seen, other employers are made liable for their superintendents.[1] Railroad companies are not only made liable by the Massachusetts act for a superintendent's negligence,[2] but also for "the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive-engine or train upon a railroad."[3]

The English and Colorado statutes are to the same effect, though the English act uses the word "points" instead of "switch."[4]

The Alabama act goes further in this direction, and makes a railroad company liable for "the negligence of any person in the service or employment of the master or employer who has the charge or control of any signal, points, locomotive, engine, switch, car or train upon a railway, or of any part of the track of a railway."[5]

The Indiana act of 1893 imposes a still greater liability upon railroad corporations, and gives the railroad employee a right of action for an injury received in the service, "where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph-office, switch-yard, shop, round-house, locomotive-engine or train upon a railway."[6]

The New York Employers' Liability Act of 1902, ch.

[1] Ante, §§ 81, 82.

[2] Davis v. New York &c. R. Co., 159 Mass. 532; 34 N. E. 1070.

[3] St. 1887, ch. 270, § 1, cl. 3; Rev. laws 1902, ch. 106, § 71; Perry v. Old Colony R. Co., 164 Mass. 296; 41 N. E. 289.

[4] 43 & 44 Vict., cap. 42, § 1, subs. 5; Colo. Sess. Laws 1893, ch. 77, § 1, cl. 3.

[5] Alabama code 1886, § 2590, cl. 5; code 1896, § 1749, cl. 5.

[6] Burns R. S. 1901, § 7083, cl. 4.

600, omits this clause entirely. Railroad employees have no greater rights under this act than other classes of employees, and the railroad employer is not placed under any greater liability than other classes of employers.

§ 105. "Train" defined.—The Massachusetts act gives a right of action to an employee of a railroad company who is injured "by reason of the negligence of any person in the service of the employer who has charge or control of any * * * train upon a railroad," and the statute of 1897, chapter 491,[1] defines a "train" as follows: "One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause 3 of this section."

Even before the passage of this statute of 1897, chapter 491, it was decided that to constitute a "train" within the meaning of the statute, it is not necessary that the cars should be attached to a locomotive at the moment of the injury, or that two or more cars should be coupled together at that time. Thus, in Devine v. Boston &c. R. Co. (Mass.),[2] a car-cleaner was injured by the car in which she was working striking a bunting-post with unusual force. It appeared that the cars from a train which had recently arrived at their destination were being distributed over the proper tracks under the charge or control of the conductor. Two cars, in one of which was the plaintiff, were kicked off with such force by the locomotive, owing to the failure of the conductor to give the stop-signal in time, that they bumped with great force against the bunting-post. It was held that the jury was justified in finding that the injury was due to the negligence of a person in charge of a train, although the cars were separated from the locomotive at the moment when

[1] Rev. laws 1902, ch. 106, § 71, cl. 3.
[2] 159 Mass. 348; 34 N. E. 539.

they struck the post, and that the railroad company was liable in damages.

To the same effect is Caron v. Boston &c. R. Co. (Mass.).[1]

An ordinary electric car run in the streets and not upon a steam-railroad is not a "train" within the meaning of the act, though in motion at the time of the accident, because it is run upon a street-railway and not upon a steam-railroad. "So far as any definition has been given by statute to the word 'railroad,'" says Mr. Justice Morton, "it has been confined to railroads operated by steam.[2] * * * This undoubtedly was the sense in which the words were used by the legislature when the statute was enacted, and we do not feel justified now in giving to them the broad construction for which the plaintiff contends."[3]

In Dacey v. Old Colony R. Co. (Mass.),[4] the court, by Knowlton, J., defined a "train," within the meaning of the original Massachusetts statute, as "a locomotive and one or more cars connected together and run upon a railroad."[5]

Under the English act of 1880 it has been held that it is not necessary that a locomotive-engine should be attached in order to constitute several cars a "train" within the meaning of the act; and that a number of trucks propelled along a line of rails in a goods-station, by means of a stationary engine at a distance, constitutes a "train upon a railway," under section 1, subsection 5, of the statute.[6] In this case Mr. Justice Mathew says, on page

[1] 164 Mass. 523; 42 N. E. 112.

[2] Mass. Pub. Stats., ch. 112, § 1.

[3] Fallon v. West End St. R. Co., 171 Mass. 249; 50 N. E. 536 (1898).

[4] 153 Mass. 112, 115; 26 N. E. 437.

[5] See also, Shea v. New York &c. R. Co., 173 Mass. 177, 178; 53 N. E. 396 (1899).

[6] Cox v. Great Western R. Co., 9 Q. B. D. 106.

109: "Did the twelve trucks constitute a train? It seems to me that they did. A train is a train, whether consisting of trucks laden with goods, or of carriages filled with passengers. The character of the load makes no difference. Nor do I think that a locomotive-engine is essential to the making of a train. The place where the accident occurred was clearly a part of the line of railway." The opinion of Mr. Justice Cave is to the same effect.

§ 106. "Locomotive-engine."—Under the English act it has been decided that a steam-crane fixed on a trolley, and propelled by steam along a set of rails when necessary to move it, and used for lifting heavy weights in constructing a railway, is not a "locomotive-engine" within the meaning of the statute, and that therefore no action could be maintained for an injury caused by the negligence of the person in charge or control of the crane.[1] Pollock, B., says on page 525 of the case just cited: "The words used in the subsection, in connection with the term 'locomotive-engine,' refer exclusively to well-known things connected with the ordinary working of a railway. The machine in this case is intended to lift heavy weights of stone, and other materials used in constructing a railway, having besides an accidental power of applying its steam-force to the trolley. If the legislature had intended to include any such machine, they would have used proper terms."

An electric street-car is not a "locomotive-engine" under the Massachusetts act.[2]

§ 107. "Car."—The Alabama act, making a railroad liable for the negligence of any person having charge or control of a "car," applies to a hand-car as well as to an ordinary car.[3]

[1] Murphy v. Wilson, 52 L. J. (Q. B.) 524.

[2] Fallon v. West End St. R. Co., 171 Mass. 249; 50 N. E. 531 (1898).

[3] Richmond &c. R. Co. v. Hammond, 93 Ala. 181; 9 So. 577; Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; 11 So. 262.

§ 108. **"Upon a railroad."**—A locomotive-engine at rest upon the rails of a railroad round-house, where it had been left for temporary repairs, is not "upon a railroad" within the meaning of the Massachusetts Employers' Liability Act; and therefore one sent to repair it can not recover for injuries received through the negligence of the defendant's employee in charge or control of the engine.[1]

A railroad-track, though it is a short and temporary affair used in transporting gravel under a special contract with a third person, may be a "railroad" within the meaning of the Massachusetts Employers' Liability Act.[2]

In England it has been held that a temporary track laid down for purposes of construction by a contractor is a "railway" within the meaning of the English Employers' Liability Act of 1880.[3]

In Fallon v. West End St. R. Co. (Mass.)[4] a conductor of a street-car operated by electricity was injured by reason of the negligence of the motorman. The plaintiff contended that such a street-railway car is a "locomotive-engine or train upon a railroad" within the meaning of the Massachusetts Employers' Liability Act. But the court held that by these words must be understood a railroad and locomotive-engines and trains operated and run or originally intended to be operated and run in some manner and to some extent by steam. "Possibly a railroad where the motive power has been changed in part or altogether from steam to electricity," says Mr. Justice Morton (page 250), "or some other mechanical agency, but which retains in other respects the characteristics of

[1] Perry v. Old Colony R. Co., 164 Mass. 296; 41 N. E. 289.

[2] Coughlan v. City of Cambridge, 166 Mass. 268; 44 N. E. 218.

[3] Doughty v. Firbank, 10 Q. B. D. 358. Compare with this English case the Massachusetts case of Trask v. Old Colony R. Co., 156 Mass. 298; 31 N. E. 6.

[4] 171 Mass. 249; 50 N. E. 536.

the steam-railroad, would come within the purview of the act. It is not necessary, however, to decide that question now. The defendant is a street-railway operated by electricity and running the usual street-car in the usual manner."

§ 109. Statutory defects in freight-cars, grab-irons and draw-bars—Blocking of frogs, switches, and guard-rails. —The Massachusetts statute of 1895, chapter 362, requires locomotives and cars used in traffic within the state to be equipped with certain safety-appliances. A failure on the part of a railroad corporation doing business within the state to comply with the requirements of this statute would probably render it liable for injuries caused thereby to its employees, under the Employers' Liability Act. The act of congress of March 2, 1893,[1] relating to common carriers engaged in interstate commerce, contains like provisions respecting such common carriers and their employees.[2]

Sections 3 and 4 of this Massachusetts act declare that:

"Section 3. On and after the first day of July in the present year, and until otherwise ordered by the board of railroad commissioners, no railroad corporation shall use, in moving traffic between points in this commonwealth, any car which is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars: provided, that this section shall not apply to flat-cars which are equipped with automatic couplers such as are described in section 2.

"Section 4. The standard height of draw-bars for freight-cars, measured perpendicularly from the level of

[1] 27 U. S. Stats. at Large 531, ch. 196.

[2] This act of congress is construed in Cleveland &c. R. Co. v. Baker, 91 Fed. 224.

the top of the rails to the centers of the draw-bars, shall be thirty-four and one-half inches for standard-gauge railroads, and twenty-six inches for narrow-gauge railroads, with a maximum variation from such standard height, in either case, of three inches between the draw-bars of empty and loaded cars; and, on and after the date last above named, no freight-car, either loaded or unloaded, shall be used in moving traffic between points in this commonwealth with draw-bars which do not comply with the above standard."

Both the Massachusetts statute and the act of congress above mentioned expressly declare that an employee's continuance in the service with knowledge of the defect shall not be deemed an assumption of the risk of injury.[1] Even if these statutes had not contained this provision, the employee injured thereby would not have been precluded from recovering by such conduct and knowledge, because the defense based upon the maxim Volenti non fit injuria does not apply when the injury is caused by the employer's breach of a specific statutory duty imposed upon him for the protection of his employees. In Baddeley v. Granville[2] this point was expressly decided with respect to the coal-mines regulation act, 1872, which required a banksman to be kept at the mouth of a coal-pit while the miners were going up or down the shaft.

The Massachusetts statute of 1894, chapter 41, entitled "An act to provide for the blocking of railroad-frogs, switches and guard-rails," does not contain any provision which prevents such conduct on the part of the employee from amounting to an assumption of the risk of injury caused by a failure of the railroad to comply with the terms of the statute. Section 1 of this act reads as follows:

[1] Mass. St. 1895, ch. 362, § 7; 27 U. S. Stats. at Large 531, ch. 196, § 8.
[2] 19 Q. B. D. 423. See further, §§ 229, 230, post.

"Section 1. Every railroad corporation shall, before the first day of October in the present year, block, or cause to be blocked, the frogs, switches and guard-rails, excepting guard-rails on bridges, in or connected with any and all railroad-tracks operated or used by it in this commonwealth, and shall thereafter keep the same so blocked by some method or methods approved by the board of railroad commissioners, so as to prevent employees from being caught therein."

§ 110. "Charge or control" for temporary purpose.— Under the Massachusetts and Alabama acts it has been held that to constitute a person one in "charge or control" of a train, etc., it is not necessary that he should have the general or usual charge or control of it, but it is sufficient if he has the charge or control for a temporary purpose, or for the time being.[1] In Steffe v. Old Colony R. Co. (Mass.),[2] Mr. Justice Allen, in delivering the court's opinion, says: "The question is, Was there evidence warranting the jury in finding that Thompson, the brakeman, was in charge or control of the train? In the opinion of a majority of the court there was. The statute obviously implies that some person is to be regarded as being in charge or control of a moving train, and makes the defendant responsible for the negligence of any person in its service who has such charge or control. It is not necessary that he should be a conductor, or have any other particular office or position. The statute includes every person, and must be deemed to mean any person who has such charge or control for the time being. Ordinarily, one who is to determine whether the train is to move or remain stationary, and who is to give directions as to the moving or stopping of the train, may be said to be in the

[1] Steffe v. Old Colony R. Co., 156 Mass. 262; 30 N. E. 1137; Louisville &c. R. Co. v. Richardson, 100 Ala. 232; 14 So. 209.

[2] 156 Mass. 262; 30 N. E. 1137.

charge or control of it. In the case before us, the only persons upon the train were the engineer and the brakeman."

Under the Indiana act, the temporary use of a switch by a brakeman has been held not to place him in "charge" of it, within the meaning of the statute.[1]

Nor can an employee recover for the negligence of a co-employee who has been placed in temporary charge of a room by the foreman, while the latter is absent in another part of the building.[2]

In England, however, it has been held by the court of appeal in Gibbs v. Great Western R. Co.,[3] that to fall within the meaning of the English act of 1880 the person must have the *general* charge or control, and that a charge or control at a particular time when the negligence was committed is not sufficient to render the common employer liable. In this case an engine-driver was killed through the negligence of one Fisher in leaving the cover of a box containing machinery, which it was his duty to oil, on the track, causing a derailment of the train. The testimony showed that Fisher's duty was to clean, oil, and adjust the wires and locking-apparatus connected with the points; that the points were worked from the signal-box; that Fisher had a boy to assist him in his work; and that one Saunders, an inspector, had general charge of the points. It was held that the evidence would not warrant a finding that Fisher had the charge or control of the points within the meaning of the statute. The master of the rolls, Brett, says on page 212: "I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment."

[1] Baltimore &c. R. Co. v. Little, 149 Ind. 167, 173; 48 N. E. 862 (1897).

[2] Hodges v. Standard Wheel Co., 152 Ind. 680; 52 N. E. 391; 54 N. E. 383 (1899).

[3] 12 Q. B. D. 208.

§ 111. Person in charge or control of train.—The Massachusetts statute 1897, ch. 491,[1] defines a person in charge or control of a train as follows: "Whoever as a part of his duty for the time being physically controls or directs the movements of a signal, switch, locomotive-engine or train, shall be deemed to be a person in charge or control of a signal, switch, locomotive-engine or train within the meaning of said clause."

The mere fact that the conductor of a freight-train is temporarily absent from the train upon a duty connected with the proper management of the train is not conclusive proof that he was not in the "charge or control" of the train at the time of the injury, within the meaning of the Massachusetts act. Upon such evidence the jury is justified in finding that he was in the charge or control thereof, and a verdict for the plaintiff will not be set aside on that ground, especially when it does not appear that anything contrary to his orders or expectations was done during his absence.[2]

In Dacey v. Old Colony R. Co. (Mass.)[3] a brakeman was killed by being crushed between a moving car which he was in the act of boarding and a stationary car so near it on another track as to leave a space of less than five inches between them. The injury occurred upon a dark night in the freight-yard of the defendant in Taunton, which was an extensive one, with thirteen tracks. The plaintiff, who was the administratrix of the deceased brakeman, contended that the injury was caused by the negligence of a person in the service of the defendant, who had charge or control of a locomotive-engine or train upon its railroad, in leaving the stationary car standing so near the other track. The only evidence as to who left this car

[1] Rev. laws 1902, ch. 106, § 71, cl. 3.
[2] Donahoe v. Old Colony R. Co., 153 Mass. 356; 26 N. E. 868.
[3] 153 Mass. 112; 26 N. E. 437.

in its dangerous position was that during the afternoon the day gang, under the direction of its conductor, had been engaged in placing cars upon that track. The court held that the questions of whether the stationary car was left in that position through the negligence of a person in charge of a train, and whether the brakeman was in the exercise of due care, should have been left to the jury.

In Thyng v. Fitchburg R. Co. (Mass.)[1] a freight-brakeman was killed by reason of the negligence of some one in putting too short a coupling-pin between two freight-cars, which caused them to break apart and to throw the deceased under the rear car. The train was made up in the yard under the direction of the conductor of a switch-engine, and the plaintiff contended that the injury was due to his negligence, and that he was a person in "charge or control" of a train within the meaning of the act. But the court held that the persons who made up the train were fellow servants of the deceased, and that his administratrix could not recover. The court, speaking through Mr. Justice Knowlton, says: "A conductor of a switch-engine which is drawing several cars under his direction may be, for the time, in charge of a train consisting of the engine and cars.[2] But there is nothing to show that this conductor of a switch-engine was at any time negligent in his charge or management of such a train, or of the engine attached to it, or that his conduct in reference to such a train had any connection with the accident. His only relation to the train on which the plaintiff (deceased) worked was to bring the cars together and make the train up. His duties were ended as soon as the cars were connected so as to make a train. He never had charge or control of those cars as a train, but he was to

[1] 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425.
[2] Citing Dacey v. Old Colony R. Co., 153 Mass. 112; 26 N. E. 437.

determine what cars should be brought together to constitute the train, and see that they were properly coupled and ready to be taken away. * * * The legislature in this part of the statute has gone no further than to include those whose duties relate to the charge of a locomotive-engine, or the train when complete."[1]

In Caron v. Boston &c. R. Co. (Mass.)[2] the court, through Mr. Justice Morton, says: "It is *the* charge or control of which the statute speaks, and not *a* charge or control; and it is the charge or control of the train as a connected whole which is meant, not of portions which together form a whole.[3] We think, therefore, that by the words 'any person * * * who has the charge or control' is meant a person who, for the time being at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it." It was accordingly held that a brakeman acting under the supervision of a conductor is not a person in the charge or control of a train. This decision was rendered in 1895, and the statute of 1897, chapter 491, section 2,[4] seems to change the law.

§ 112. Brakeman or other employee may have charge or control of a train.—By the Massachusetts statute a railroad company is made liable to its employees for the negligence of "any person" in its service who has charge or control of a train. It is not necessary that such person should be a conductor, or have any particular office. "Ordinarily, one who is to determine whether the train is to move or remain stationary, and who is to give directions as to the moving or stopping of the train, may be

[1] Thyng v. Fitchburg R. Co., supra, at p. 18.
[2] 164 Mass. 523, 528; 42 N. E. 112.
[3] Citing Thyng v. Fitchburg R. Co., supra.
[4] Rev. laws 1902, ch. 106, § 71, cl. 3.

said to be in the charge or control of it." A brakeman may be such a person.[1]

Thus in Steffe v. Old Colony R. Co. (Mass.)[2] a car-inspector was injured through the negligence of a brakeman on a train who failed to give him warning of its approach or to stop the train. The engineer and the brakeman were the only persons upon the train; the train was backing, and the brakeman was stationed at the rear end of the car to watch the track, and to warn any person on the track of its approach, and to stop the train either by the automatic brake or by signaling to the engineer. It was held that this evidence warranted the jury in finding that the brakeman was in charge or control of the train, and that the railroad company was liable for his negligence. In the language of the court, by Allen, J.: "The statute includes every person, and must be deemed to mean any person who has charge or control for the time being."[3] If the action had been at common law, the plaintiff could not have recovered.[4]

Under the English statute it has been held that a "capstan-man" may be a person in charge or control of a train. In Cox v. Great Western R. Co.[5] the plaintiff was injured through the negligence of a person in the defendant's employ known as a "capstan-man," whose duty it was to propel, by means of a stationary engine at a distance, trucks laden with goods along a line of rails in a goods-station. His negligence consisted in a failure to give the usual warning that he had sent the trucks down the line towards the plaintiff, who was engaged in similar work at the other end of the line, about one

[1] Shea v. New York &c. R. Co., 173 Mass. 177; 53 N. E. 396.
[2] 156 Mass. 262; 30 N. E. 1137.
[3] Steffe v. Old Colony R. Co., supra, at p. 264.
[4] Gillshannon v. Stony Brook R. Co., 10 Cush. (Mass.) 228; Seaver v. Boston &c. R. Co., 14 Gray (Mass.) 466.
[5] 9 Q. B. D. 106.

hundred yards distant. It was held that the evidence would warrant a finding that the capstan-man was a person in charge or control of a train upon a railway.

The English house of lords has held under the Employers' Liability Act of 1880 that a locomotive-engineer and also a fireman may have the charge or control of a train within the meaning of that statute, and that such person does not necessarily cease to have such charge or control when some of the cars are uncoupled from each other and from the engine in order that they may be separately dealt with. In McCord v. Cammel [1] an engineer in order to unload some cars of the train at the proper place, left the rear cars at a standstill and proceeded with the engine and one car to the place of discharge. The fireman uncoupled the rear cars and scotched them to prevent them from running down the incline. One of the cars broke away and ran down the incline and killed the plaintiff's husband, a workman in the service of the same employers, the defendants in this case. There was evidence that the method of scotching was unsafe and was known to and approved by the engineer. The trial court ordered a nonsuit, which was affirmed by the court of appeal. In the house of lords, however, it was held that there was evidence of negligence for the jury on the part of both the engineer and fireman, and that one of these persons had charge or control of the train within the meaning of the act.

§ 113. Different views at common law concerning person in charge or control of train.—At common law, in most jurisdictions, the conductor or other person having the charge or control of a moving train is deemed a fellow servant with a common laborer employed upon the track, or other employee, and therefore the railroad company is

[1] (1896) A. C. 57.

not liable to either for an injury caused by the negligence of the other employee.[1] The different views are thus summarized by the supreme court of the United States, speaking through Mr. Justice Brown, in the case of Northern Pacific R. Co. v. Hambly:[2] "There is probably no subject connected with the law of negligence which has given rise to more variety of opinion than that of fellow service. The authorities are hopelessly divided upon the general subject as well as upon the question here involved. It is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation. It may be said in general that, as between laborers employed upon a railroad-track and the conductor or other employees of a moving train, the courts of Massachusetts, Rhode Island, New York, Indiana, Iowa, Michigan, North Carolina, Minnesota, Maine, Texas, California, Maryland, Pennsylvania, Arkansas and Wisconsin hold the relation of fellow servants to exist;[3] while in Illinois, Missouri, Virginia, Ohio and Kentucky

[1] New England R. Co. v. Conroy, 175 U. S. 323; 20 S. Ct. 85; Sherman v. Rochester, 17 N. Y. 153; Clifford v. Old Colony R. Co., 141 Mass. 564; 6 N. E. 751 (1886); Hodgkins v. Eastern R. Co., 119 Mass. 419.

[2] 154 U. S. 349, 355, 356; 14 S. Ct. 983.

[3] Citing Farwell v. Boston &c. R. Co., 4 Met. (Mass.) 49; 38 Am. D. 339; Clifford v. Old Colony R. Co., 141 Mass. 564; 6 N. E. 751; Brodeur v. Valley Falls Co., 16 R. I. 448; 17 Atl. 54; Harvey v. New York Cent. R. Co., 88 N. Y. 481; Gormley v. Ohio &c. R. Co., 72 Ind. 31; Collins v. St. Paul &c. R. Co., 30 Minn. 31; 14 N. W. 60; Pennsylvania R. Co. v. Wachter, 60 Md. 395; Houston &c. R. Co. v. Rider, 62 Tex. 267; St. Louis &c. R. Co. v. Shackelford, 42 Ark. 417; Blake v. Maine Cent. R. Co., 70 Me. 60; 35 Am. R. 297; Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384; Sullivan v. Mississippi &c. R. Co., 11 Iowa 421; Fowler v. Chicago &c. R. Co., 61 Wis. 159; 21 N. W. 40; Kirk v. Atlanta &c. R. Co., 94 N. C. 625; 55 Am. R. 621; Quincy Mining Co. v. Kitts, 42 Mich. 34; 3 N. W. 240; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; 42 Am. R. 543.

the rule is apparently the other way.[1] The cases in Tennessee seem to be divided."[2]

The point decided in Northern Pacific R. Co. v. Hambly[3] was that the conductor and engineer of a railroad-train are fellow servants with a common day-laborer, who, while working for the company under a section-boss on a culvert, receives an injury through their negligence in moving and operating a passenger-train, and he therefore can not recover of the common employer, the railroad company.[4]

Although the federal courts have held that a conductor is a vice-principal toward a brakeman on the same train, and the railroad company is liable to the brakeman for an injury caused through the conductor's negligence,[5] yet this has been recently overruled.[6]

§ 114. Who may have the charge or control of locomotive-engine.—In Louisville &c. R. Co. v. Richardson (Ala.)[7] the plaintiff, while engaged in wiping grease off of a switch-engine, was scalded through the negligence of a hostler in opening the throttle and permitting the steam

[1] Citing Chicago &c. R. Co. v. Moranda, 93 Ill. 302; Sullivan v. Missouri Pac. R. Co., 97 Mo. 113; 10 S. W. 852; Richmond &c. R. Co. v. Norment, 84 Va. 167; 4 S. E. 211; 10 Am. St. 827; Dick v. Railroad Co., 38 Ohio St. 389; Louisville &c. R. Co. v. Caven, 9 Bush (Ky.) 559; Madden v. Chesapeake &c. R. Co., 28 W. Va. 610; 57 Am. R. 695.

[2] Citing East Tennessee &c. R. Co. v. Rush, 15 Lea (Tenn.) 145; Louisville &c. R. Co. v. Robertson, 9 Heisk. (Tenn.) 276; Haley v. Mobile &c. R. Co., 7 Baxt. (Tenn.) 239; Nashville &c. R. Co. v. Jones, 9 Heisk. (Tenn.) 27; East Tennessee &c. R. Co. v. Gurley, 12 Lea (Tenn.) 46.

[3] 154 U. S. 349; 14 S. Ct. 983.

[4] Following Randall v. Baltimore &c. R. Co., 109 U. S. 478; 3 S. Ct. 322; Quebec Steamship Co. v. Merchant, 133 U. S. 375; 10 S. Ct. 397; Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 S. Ct. 914; distinguishing Chicago &c R. Co. v. Ross, 112 U. S. 377; 5 S. Ct. 184.

[5] Chicago &c. R. Co. v. Ross, 112 U. S. 377, 394; 5 S. Ct. 184; Canadian Pac. R. Co. v. Johnston, 61 Fed. 738.

[6] New England R. Co. v. Conroy, 175 U. S. 323; 20 S. Ct. 85 (1899).

[7] 100 Ala. 232; 14 So. 209.

to blow out into his face. The engineer was standing on the ground, packing a gland-valve. There was evidence that the hostler, whose regular duty it was to move road-engines about the yard, had been ordered not to move switch-engines, but that he frequently did move them, and that he got on the engine at the time in question for the purpose of moving it. There was no evidence that the engineer and hostler had any joint control over the engine. The presiding justice refused to rule that, if the engineer was in charge or control of the engine at the time of the accident, the plaintiff could not recover. On appeal, however, it was held that the refusal to give the instruction requested was reversible error. In the court's opinion, delivered by Mr. Justice Haralson, it is said on page 236: "The question as to what person, on the occasion of the injury to the plaintiff, had charge or control of the engine, is one of fact, properly left to the jury, with instructions under the evidence in the cause. Generally, we would say, especially when he is on and running the engine, or has the actual custody, that the engineer has control of it. It may be, however, when he is not in the active manipulation of it, that other persons control it. It will not do to say, therefore, as a matter of law, who has the control or charge of an engine at any particular time, when it is fairly inferable from the evidence that either one or the other of two persons may have such control. In each particular case time, place, and circumstances must determine the question of immediate control."

In Louisville &c. R. Co. v. Mothershed (Ala.),[1] Mr. Justice Coleman, in delivering the court's opinion, says: "If McNutt, the yardmaster and the superior of all the other employees present, personally took the place of the

[1] 97 Ala. 261, 267; 12 So. 714.

engineer and was running the engine at the time of the accident, the defendant railroad company would be liable for his negligence, the same as if the engineer himself had been in charge and had been guilty of the same act of negligence."

In Alabama &c. R. Co. v. McDonald (Ala.)[1] it was ruled that an engineer engaged in backing cars for the purpose of making up a train is a person in charge or control of a locomotive-engine within the meaning of the Alabama Employers' Liability Act.

If it is a part of a fireman's duty to receive signals from switchmen and transmit them to the engineer, he may be for that purpose a person in charge or control of the engine, within the meaning of the Alabama act. "This duty on the part of the fireman," says Mr. Justice McClellan, "arises from, and is rested upon, the impracticability of the engineer's personally keeping the necessary outlook under certain circumstances, as where, from his position on the engine, he can not see along the fireman's side of his train."[2]

At common law, the engineer and fireman of a locomotive-engine are fellow servants, and their common employer, the railroad company, is not liable to either for the negligence of the other. Even when the engine is run alone without a train attached, and a rule of the company provides that in such case the engineer shall be "regarded as conductor, and will act accordingly," the company is not liable to the fireman for the negligence of the engineer.[3]

[1] 112 Ala. 216; 20 So. 472 (1896).

[2] Brown v. Louisville &c. R. Co., 111 Ala. 275, 289, 290; 19 So. 1001 (1896).

[3] Baltimore &c. R. Co. v. Baugh, 149 U. S. 368; 13 S. Ct. 914. Contra in Ohio, it seems, where the doctrine of "superior servant" prevails: Little Miami R. Co. v. Stevens, 20 Ohio 415; Cleveland &c. R. Co. v. Keary, 3 Ohio St. 201; Berea Stone Co. v. Kraft, 31 Ohio St. 287, 291, 292; 27 Am. R. 510.

§ 115. Who may have the charge or control of a car.—The foreman of a gang of men using a hand-car may be a person in charge or control of a car, within the meaning of the Alabama statute.[1]

At common law, a car-inspector is a fellow servant with a freight-brakeman, and therefore the common employer is not liable to the brakeman for the negligent act of the inspector.[2]

§ 116. Person in charge or control of switch.—A "tower-man" in a railroad-yard who is stationed in the switch-tower and who moves and sets the switches in the yard is a person in charge or control of a switch, within the Massachusetts act, although he receives the orders for moving the switches from the plaintiff, or other coemployees in the yard. The tower-man has complete manual control of the switch after receiving signals and orders from persons below; and, therefore, the circumstance that another person exercised supervision over him in such a way as to be in charge or control of the switch in a broad sense, so that the railroad company might be liable for the latter's negligence in giving orders, or in failing to give proper orders, does not relieve the company from liability for the negligence of the tower-man.[3]

§ 117. Negligence of person in charge or control of signal, switch, engine, car, etc.—(1) Indiana.—The Indiana act[4] makes a railroad company liable for "the negligence of any person in the service of such corporation who has

[1] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; 11 So. 262.

[2] Smoot v. Mobile &c.R. Co., 67 Ala. 13; Dewey v. Detroit &c. R. Co., 97 Mich. 329; 52 N. W. 942; 56 N. W. 756; 37 Am. St. 348; 22 L. R. A. 292. Contra, Cooper v. Pittsburg &c. R. Co., 24 W. Va. 37; Condon v. Missouri &c. R. Co., 78 Mo. 567; s. c. sub nom. Missouri Pac. R. Co. v. Condon, 17 Am. & Eng. R. Cas. 589.

[3] Welch v. New York &c. R. Co., 176 Mass. 393; 57 N. E. 668; s. c. on second appeal, 182 Mass. —; 64 N. E. 695 (1902).

[4] Burns R. S. 1901, § 7083, cl. 4.

charge of any signal, telegraph-office, switch-yard, shop, round-house, locomotive-engine or train upon a railway."

It has been contended that the words "switch" and "yard" should be separated by a comma, so as to make the railroad responsible both for the switch and for the yard; but the supreme court has decided that the term "switch-yard" is synonymous with "railroad-yard," and is so used correctly in the statute.[1]

Under the fourth subdivision of the first section of the Indiana act[2] it has been held that railroad companies are liable to their employees the same as to strangers for the negligence of their servants in charge of signals, telegraph-offices, switch-yards, shops, round-houses, locomotive-engines and trains upon their railways.[3]

In Chicago &c. R. Co. v. Richards (Ind.)[4] a brakeman, while on top of a moving car, was hit by a car standing on a side-track. The side-track had one rail much higher than the other, so that the stationary car was tilted very near to the top of the moving car—about six inches from it. The stationary car had been left in this dangerous position by the conductor of another train, shortly before the accident to the plaintiff. It was held that an action under the Employers' Liability Act could be maintained for the negligence of a person in charge of a train, the conductor being such a person, and being negligent.[5]

(2) Colorado.—In Colorado a fireman on one train of the

[1] Baltimore &c. R. Co. v. Little, 149 Ind. 167; 48 N. E. 862 (1897); citing Harley v. Louisville &c. R. Co., 57 Fed. 144; St. Louis &c. R. Co. v. Robbins, 57 Ark. 377; 21 S. W. 886.

[2] Burns R. S. 1901, § 7083, cl. 4.

[3] Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943 (1901); Baltimore &c. R. Co. v. Little, 149 Ind. 167; 48 N. E. 862. For the contrary rule at common law, see Spencer v. Ohio &c. R. Co., 130 Ind. 181; 29 N. E. 915.

[4] 28 Ind. App. 46; 61 N. E. 18 (1901).

[5] Black, C. J., cited Dacey v. Old Colony R. Co., 153 Mass. 112; 26 N. E. 437; Kansas &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88.

defendant company was injured by the negligence of a conductor on another train in leaving a switch open which it was his duty to see was left closed. In an action at common law it was held that this was a duty of operation which could be delegated and was not personal to the employer; that the conductor and the fireman were fellow servants; that the specific act in connection with which the negligence occurs is the criterion by which the employer's liability is fixed, rather than the superior rank of the employee who performs the act; and that the plaintiff assumed the risk of the conductor's negligence and could not recover.[1] The Employers' Liability Act changes this rule of the common law.

§ 118. Same—Alabama.—In Highland Ave. &c. R. Co. v. Miller (Ala.)[2] it was held to be actionable negligence on the part of an engineer in charge of an engine, who "gave a hard knock forward and then backed up," when he was signaled to back in the first place, thereby throwing the plaintiff off the car and running over his leg.

In Louisville &c. R. Co. v. Bouldin (Ala.)[3] a switchman standing on the running-board of a switch-engine was knocked off and run over, by his foot striking an oil-box which had been carelessly left near the track, and it was held that the engineer in charge of the engine was not negligent in failing to warn the switchman of this obstruction near the track. This conduct does not show that the engineer was lacking in ordinary care and prudence, and as remarked by Chief Justice McClellan (pp. 203–4), "it is the rule of ordinary care which obtains in this connection—not of strict, or of the utmost care and diligence."

In Richmond &c. R. Co. v. Jones (Ala.)[4] a switchman

[1] Denver &c. R. Co. v. Sipes, 23 Colo. 226; 47 Pac. 287 (1896).
[2] 120 Ala. 535; 24 So. 955 (1899).
[3] 121 Ala. 197; 25 So. 903 (1899).
[4] 92 Ala. 218; 9 So. 276.

while uncoupling cars was injured by the backing of the locomotive and its collision with the car. The plaintiff was standing on the foot-board of the engine-tender, and gave the signal by his lantern to go ahead. The fireman gave the signal to the engineer to back. The presiding judge charged the jury that, if the fireman was placed there to receive signals from the switchman, and to communicate them to the engineer, and that instead of giving the go-ahead signal he gave the back-up signal, and thereby caused the plaintiff's injury, the plaintiff could recover against the railroad company under the Employers' Liability Act. The supreme court, in affirming this ruling, says on page 227, by Mr. Justice Coleman: "The evidence tended to show that it was the duty of firemen to receive signals from switchmen, and transmit them to the engineer. If the injury to plaintiff was caused by negligence of the fireman in transmitting the signals to the engineer, given to him for that purpose by the plaintiff in the discharge of his duty as a switchman, such injury is clearly within the provision of the Employers' Liability Act." The court does not specify the precise clause under which the defendant was liable, but it seems to fall under the clause making a railroad company liable to its employees for the negligence of any person in its service having the charge or control of any signal, engine or train upon a railroad.[1]

A person having the charge or control of railroad-cars who places one of them in such close proximity to another track as to knock off a brakeman upon a passing freight-car upon the latter track, while in the proper and careful discharge of his duty, is guilty of negligence, for which the common employer is liable under the Alabama statute.[2]

[1] For the negligence of a person in charge of a "signal," see also, Cowen v. Ray, 108 Fed. 320 (1901).

[2] Kansas City &c. R. Co. v. Burton, 97 Ala. 240; 12 So. 88.

The failure of one in charge of a locomotive-engine to stop or slow up in approaching a switch, as required by the rules of the railroad company, is actionable negligence, for which the railroad is liable to another employee for an injury caused thereby.[1]

The foreman of a gang of men on a hand-car who, while the car is in rapid motion on a down grade, suddenly applies the brake and checks its speed without warning to the men, whereby the plaintiff is thrown off the car and run over, is guilty of negligence; and if such foreman had the charge or control of the car at the time, an action may be maintained against the common employer, a railroad company, under the Alabama Employers' Liability Act.[2]

§ 119. Negligence need not be in the performance of a duty which is personal to the employer. — The Ohio fellow-servant act declares that every person in the employ of a railroad company "having power or authority to direct or control any other employee of such company is not a fellow servant, but the superior of such other employee," and gives a right of action to the inferior employee who is injured by reason of the negligence of his superior. In an action brought against a railroad company by a brakeman for the negligence of a conductor, the defendant contended that it was not liable because the conductor was not negligent in the performance of any duty imposed by law upon the master personally, but merely in respect of the performance of work pertaining to the conductor. But the court by Mr. Justice Harlan said that if this contention was sustained, the statute would be deprived of all practical value, and further remarked: "The object of the statute was to make one to

[1] Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714.
[2] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; 11 So. 262.

whom is committed by a railway company the authority to direct and control employees in the same service the representative, in respect of that service of the common employer, so that his acts within the scope of his employment are the acts of the company, and his negligence its negligence."[1]

§ 120. Railroads operated by receivers.—The fact that a railroad is in the hands of a receiver does not prevent an employe from recovering damages for personal injuries received through the negligence of a fellow servant under the statute of the state of injury. Such a state statute changing the rule of the common law applies to receivers operating railroads under appointment from federal courts, as well as to the railroads themselves.[2] This subject is further discussed in section 6, ante.

§ 121. Same—Prior leave of appointing court to sue.—Irrespective of statute, it is held in most jurisdictions that a railroad receiver can not be sued without prior leave of the appointing court. Without such leave the court has no jurisdiction, and must dismiss the suit.[3] Congress has, however, changed this rule in regard to federal receivers,[4] and this statute authorizes suits against such receivers both in the state courts[5] and in the federal courts[6] without prior leave of the appointing court.

[1] Pierce v. Van Dusen, 78 Fed. 693, 705 (1897).

[2] Hornsby v. Eddy, 56 Fed. 461; 5 C. C. A. 560; Rouse v. Hornsby, 67 Fed. 219; Murphy v. Holbrook, 20 Ohio St. 137; Paige v. Smith, 99 Mass. 395; Little v. Dusenberry, 46 N. J. L. 614; 50 Am. R. 445. Contra, Turner v. Cross, 83 Tex. 218; 18 S. W. 578; 15 L. R. A. 262.

[3] Barton v. Barbour, 104 U. S. 126; Robinson v. Atlantic &c. R. Co., 66 Pa. St. 160; Palys v. Jewett, 32 N. J. Eq. 302; Noe v. Gibson, 7 Paige (N. Y.) 513.

[4] 24 U. S. Stats. at Large 554, March 3, 1887, ch. 373, § 3.

[5] McNulta v. Lochridge, 141 U. S. 327; 12 S. Ct. 11.

[6] Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 S. Ct. 905.

§ 122. Constitutionality—Discrimination against railroads.—The fact that the Employers' Liability Acts discriminate against railroads by imposing greater liabilities upon them for personal injuries received by their employees than upon other classes of employers does not render the statutes unconstitutional.

The Indiana Employers' Liability Act of 1893,[1] as construed by the supreme court of Indiana, has been held by the supreme court of the United States to be constitutional and not to deny to railroad corporations the equal protection of the laws within the meaning of the fourteenth amendment.[2]

The hazardous character of the business of operating a railroad was held to justify the imposition of a greater liability upon railroad corporations than upon other corporations where the business was not so hazardous. Although the statute discriminates against railroad corporations it does not work an unconstitutional discrimination within the meaning of the constitutional provision. All railroad corporations are without distinction made subject to the same liabilities. The fact that railroad corporations are put in a separate class by themselves and their employees given greater rights than employees of other corporations does not invalidate the statute.

In holding that the Indiana act does not work an unconstitutional discrimination against railroad employers as compared with other classes of employers because railroads are made liable to their employees, the same as to strangers, for the negligence of their servants in charge of signals and some other appliances, Mr. Justice Baker says in Indianapolis Union R. Co. v. Houlihan (Ind.):[3] "It is competent for the legislature, in the exercise of the police power, to take steps for the protection of the lives

[1] Burns R. S. 1901, §§ 7083–7087.

[2] Tullis v. Lake Erie &c. R. Co., 175 U. S. 348; 20 S. Ct. 136 (1899).

[3] 157 Ind. 494, 501; 60 N. E. 943, 945, 946.

and limbs of all persons who may be exposed to dangerous agencies in the hands of others; the powerful forces in railroading that are under the direction and control of those in charge of 'any signal, telegraph-office, switch-yard, shop, round-house, locomotive-engine or train upon a railway,' were proper to be selected as sources of unusual danger which should be guarded against. * * * And such legislation has been upheld by the state and federal courts."[1]

In Pittsburg &c. R. Co. v. Montgomery (Ind.)[2] the Indiana Employers' Liability Act was attacked upon the grounds of depriving railroads of the equal protection of the law, and as embracing more than one subject or matter properly connected therewith; but the supreme court decided that the act was not inconsistent with the constitution upon either ground.

The Missouri fellow-servant act of 1897, making railroad companies liable to their employees for injuries caused by the negligence of coemployees, as well as the agents and officers of the company, is constitutional, although it discriminates against railroads as employers, by not imposing a like liability upon other classes of employers.[3]

The Ohio fellow-servant act of 1890 has also been adjudged constitutional.[4]

With respect to the so-called "railroad acts," which make railroad companies liable for injuries to employees caused by the negligence of coemployees, without imposing that liability upon other classes of employers, it is

[1] Citing Reno Employers' Liability Acts (1st ed.), §§ 84, 85 (2d ed., §§ 122, 123); Missouri &c. R. Co. v. Mackey, 127 U. S. 205; 8 S. Ct. 1161.

[2] 152 Ind. 1; 49 N. E. 582; 71 Am. St. 301 (1898).

[3] Powell v. Sherwood, 162 Mo. 605 (1901). See also, Humes v. Missouri Pac. R. Co., 82 Mo. 221; 52 Am. R. 369; s. c. affirmed sub nom. Missouri Pac. R. Co. v. Humes, 115 U. S. 512; 6 S. Ct. 110.

[4] Pierce v. Van Dusen, 78 Fed. 693; 24 C. C. A. 280 (1897).

settled that they are not unconstitutional as depriving railroads of their property without due process of law, nor as denying to them the equal protection of the laws, within the meaning of the fourteenth amendment to the United States constitution.[1]

In Missouri Pacific R. Co. v. Mackey[2] a fireman was injured through the negligence of an engineer, both being in the service of the railroad company. The fireman sued the railroad in a state court of Kansas, under the Kansas statute of 1874, which reads as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." The plaintiff recovered a verdict for $12,000, and, after judgment in the state court, the defendant carried the case up to the United States supreme court. That court affirmed the judgment for the following reasons, as stated by Mr. Justice Field: "At the trial, and in the supreme court of the state, it was contended by the defendant (and the contention is renewed here) that the law of Kansas of 1874 is in conflict with the fourteenth amendment of the constitution of the United States, in that it deprives the company of its property without due process of law, and denies to it the equal protection of the laws.

[1] Missouri Pacific R. Co. v. Mackey, 127 U. S. 205; 8 S. Ct. 1161; affirming s. c. 33 Kan. 298; 6 Pac. 291; Minneapolis &c. R. Co. v. Herrick, 127 U. S. 210; 8 S. Ct. 1176; affirming s. c. sub nom. Herrick v. Minneapolis &c. R. Co., 31 Minn. 11; 16 N. W. 413; 47 Am. R. 721; Bucklew v. Central Iowa R. Co., 64 Iowa 603; 21 N. W. 103; Missouri Pac. R. Co. v. Haley, 25 Kan. 35; Chicago &c. R. Co. v. Pontius, 52 Kan. 264; 34 Pac. 739; s. c. affirmed 157 U. S. 209; 15 S. Ct. 585; Chicago &c. R. Co. v. Stahley, 62 Fed. 363.

[2] 127 U. S. 205; 8 S. Ct. 1161.

"In support of the first position the company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employees caused by the negligence or incompetency of a fellow servant, which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after knowledge of his negligence or incompetency. The rule of law is conceded where the person injured, and the one by whose negligence or incompetency the injury is caused, are fellow servants in the same common employment, and acting under the same immediate direction.[1] Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company, as we understand it, is that that law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken; and thus authorizes in such cases the taking of property without due process of law, in violation of the fourteenth amendment. The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it can not be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute-books of every state. The hardship or injustice of the law of Kansas of 1874, if there be any, must be relieved by legislative enactment. The only question for our examination, as the law of 1874 is presented to us in this case, is whether it is in conflict with

[1] Chicago &c. R. Co. v. Ross, 112 U. S. 377, 389; 5 S. Ct. 184.

clauses of the fourteenth amendment. The supposed hardship and injustice consist in imputing liability to the company where no personal wrong or negligence is chargeable to it or to its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged with injuries to passengers. Whatever care and precaution may be taken in conducting its business or in selecting its servants, if injury happen to the passengers from the negligence or incompetency of the servants, responsibility therefor at once attaches to it. The utmost care on its part will not relieve it from liability if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies where injuries are subsequently suffered by employees, though it may be by the negligence or incompetency of a fellow servant in the same general employment and acting under the same immediate direction. That its passage was within the competency of the legislature we have no doubt.

"The objection, that the law of 1874 deprives the railroad companies of the equal protection of the laws, is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of naviga-

ble rivers, are instances of this kind. Such legislation does not infringe upon the clause of the fourteenth amendment, requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed. It is conceded that corporations are persons within the meaning of the amendment.[1] But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of leg-

[1] Citing Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394; 6 S. Ct. 1132; Pembina Consolidated Mining &c. Co. v. Pennsylvania, 125 U. S. 181; 8 S. Ct. 737.

islative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufactories."[1]

§ 123. Same.—In Minneapolis &c. R. Co. v. Emmons[2] it was held that a statute of Minnesota requiring all railroad companies to fence their tracks, and making them liable for domestic animals killed or injured by their negligence, and declaring that a failure to build and maintain such fences shall be deemed "an act of negligence on the part of such companies," is constitutional and valid. In delivering the opinion, Mr. Justice Field says, on page 367:

"No discrimination is made against any particular railroad companies or corporations; all are treated alike, and required to perform the same duty; and therefore no invasion was attempted of the equality of protection ordained by the fourteenth amendment."

It has also been decided that such statutes are not contrary to a constitutional provision that all laws shall be of "uniform operation throughout the state."[3] Nor are they contrary to a clause which prohibits unequal and partial legislation on general subjects.[4] Nor do they impair the obligation of pre-existing contracts in the form of a charter granted by the state to a private corporation.[5]

Cases in which other constitutional objections to such legislation have been held untenable are cited below.[6]

[1] Citing Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 523; 6 S. Ct. 110; Barbier v. Connolly, 113 U. S. 27; 5 S. Ct. 357; Soon Hing v. Crowley, 113 U. S. 703; 5 S. Ct. 730.

[2] 149 U. S. 364; 13 S. Ct. 870.

[3] McAunich v. Mississippi &c. R. Co., 20 Iowa 338.

[4] Ditberner v. Chicago &c. R. Co., 47 Wis. 138; 2 N. W. 69.

[5] Board &c. v. Scearce, 2 Duv. (Ky.) 576.

[6] Sherlock v. Alling, 93 U. S. 99; Georgia R. &c. Co. v. Oaks, 52 Ga. 410; Boston &c. R. Co. v. State, 32 N. H. 215; Hancock v. Norfolk &c. R. Co., 124 N. C. 222; 32 S. E. 679 (1899).

In Alabama, however, contrary to the great weight of authority cited above, it has been decided that a statute giving a right of action to the parent of a minor child killed by the wrongful act of any agent or officer of a corporation or firm, without imposing a like liability upon an individual, discriminates against corporations and firms, and is unconstitutional under article 14, section 12, of the state constitution.[1] This point does not seem to have been raised or decided under the Employers' Liability Act, though many cases against railroads under this clause have been decided.

§ 124. Incompetent and negligent hospital surgeon.— In Indiana and some other states the railroad companies maintain hospitals for the care and medical treatment of employees injured in the service. The expenses for surgeons, nurses, etc., are paid wholly or partly by deductions made from the wages of the employees. Where the surgeon is regularly employed and by his negligent act in treating an injured employee he causes additional injury, the railroad company is liable for such malpractice if the surgeon was incompetent and knowledge of such incompetency was brought home to the railroad company before the negligent act was committed.[2] In such case the surgeon is not an independent contractor, but is an agent or servant of the railroad company, and the company is liable on the general principle of employing or retaining in its service an incompetent servant or agent, with knowledge of his incompetency.

[1] Smith v. Louisville &c. R. Co., 75 Ala. 449.

[2] Wabash R. Co. v. Kelley, 153 Ind. 119; 52 N. E. 152; 54 N. E. 752 (1899); Richardson v. Carbonhill Coal Co., 6 Wash. 52; 32 Pac. 1012; 20 L. R. A. 338 (1893); 10 Wash. 648; 18 Wash. 368; Texas &c. Coal Co. v. Connaughton, 20 Tex. Civ. App. 642; 50 S. W. 173 (1899); Union Pac. R. Co. v. Artist, 60 Fed. 365; Pierce v. Union Pac. R. Co., 66 Fed. 44. See also, Glavin v. Rhode Island Hospital, 12 R. I. 411; 34 Am. R. 675.

On the other hand, when the physician or surgeon is employed by the railroad company merely for a particular case and not in general, and the control of the patient is left entirely to his judgment or discretion, the company is not liable for a mere negligent act if it exercised reasonable care and prudence in selecting the surgeon.[1] In this latter case the surgeon is an independent contractor with respect to the railroad company and is not its servant or agent. In this respect a physician or surgeon differs from an attorney at law, where it is well settled that the client is liable in damages to a third person injured by reason of the negligent act of his attorney.[2]

Such railroad hospitals, supported wholly or partly by the money of the employees, differ from public charitable hospitals, and the liability of the railroad company for the surgeons employed by it to treat its injured employees is greater than that of the trustees of a public charitable hospital for the surgeons employed by them to treat free patients, who avail themselves of the benefits of the hospital as a charity and not as a right for which they have paid.[3]

[1] South Florida R. Co. v. Price, 32 Fla. 46; 13 So. 638; Pearl v. West End St. R. Co., 176 Mass. 177; 57 N. E. 339 (1900); Secord v. St. Paul R. Co., 18 Fed. 221; Latter v. Braddell, 56 L. J. C. P. 166.

[2] Shattuck v. Bill, 142 Mass. 56; 7 N. E. 39; Zinn v. Rice, 161 Mass. 571, 573; 37 N. E. 747; Pearl v. West End St. R. Co., 176 Mass. 177, 179; 57 N. E. 339, and cases cited by Chief Justice Holmes; Newberry v. Lee, 3 Hill (N. Y.) 523.

[3] McDonald v. Massachusetts General Hospital, 120 Mass. 432; 21 Am. R. 529 (1876); Fire Insurance Patrol v. Boyd, 120 Pa. St. 624; 15 Atl. 553; Perry v. House of Refuge, 63 Md. 20. But see Glavin v. Rhode Island Hospital, 12 R. I. 411; 34 Am. R. 675.

CHAPTER VI.

INJURIES RECEIVED WHILE CONFORMING TO ORDERS.

SECTION

125. Negligence of person to whose orders plaintiff was bound to conform—Alabama cases.
126. Same—English cases.
127. Same—Indiana decisions.

§ 125. Negligence of person to whose orders plaintiff was bound to conform—Alabama cases.—The third clause of section 2590 of the Alabama code of 1886 gives a right of action to an employee who is injured by reason of the negligence of any person in the service of the employer to whose orders or directions the employee, at the time of the injury, was bound to conform, and did conform, if his injury results from having so conformed.[1] The English act of 1880 contains a like provision in section 1, subsection 3. The Indiana statute of 1893 also has a like clause;[2] but the act itself does not apply to employers in general, but merely to corporate employers, and excepts municipal corporations. The statutes of Massachusetts, of New York and of Colorado do not render an employer liable for the negligence of such person.

It has been held that this clause in the Alabama act applies only to *special* orders or directions, in respect to the particular service in which the employee is engaged at the time of the injury, as distinguished from a general order or direction in reference to the discharge of his general service, growing out of the nature and scope of his employment.[3]

[1] Re-enacted in Ala. code 1896, § 1749, cl. 3.
[2] Burns R. S. Ind. 1901, § 7083, cl. 2.
[3] Mobile &c. R. Co. v. George, 94 Ala. 199, 219; 10 So. 145.

To recover under this clause, the plaintiff must establish four propositions: (1) that the person who gave the orders was in the service of the defendant; (2) that the plaintiff was bound to conform to the orders of such person; (3) that he did conform to such orders, and that his injury resulted from having so conformed; and (4) that such person was negligent in giving such orders.

In Mobile &c. R. Co. v. George (Ala.),[1] a brakeman was injured while attempting to uncouple cars from an engine. One count alleged that the plaintiff was ordered by the yardmaster to uncouple the cars from the engine, but there was no evidence that, at the time of the injury, the yardmaster gave him an order to uncouple the cars from the engine. As there was no special order to do the uncoupling of those particular cars and engine, it was held that the plaintiff could not recover under this clause.

An order to a switchman to "cut off one car" from a freight-train, given by a foreman who was five or six car-lengths away, where there was no emergency or cause for haste, will not justify the switchman in undertaking to uncouple freight-cars while in motion, and if he is injured in the attempt the railroad company is not liable therefor.[2]

§ 126. Same—English cases.—In England it has been decided that it is not necessary that the order complained of should be in express words, but that it may be implied from the surrounding circumstances. In Millward v. Midland R. Co.,[3] the plaintiff, a boy fourteen years of age, whose duty it was to assist a carman or van-driver to unload the van, was injured by two heavy iron window-frames falling upon him, which had been left unsecured in the van. At the time of the accident the plaintiff and

[1] 94 Ala. 199; 10 So. 145.
[2] Davis v. Western R. Co., 107 Ala. 626; 18 So. 173.
[3] 14 Q. B. D. 68.

the driver were unloading three window-frames, which were secured by two pieces of tarred string. The driver untied the string near the tail-end of the van, and the plaintiff untied the other string at the front of the van. The plaintiff testified that the driver gave him no order to untie the string upon this occasion, but that he had done so on other occasions, and that the driver saw him untie it upon this occasion and made no objection. The driver then pulled away one of the frames without securing the other two, and immediately afterwards the two remaining frames fell upon the plaintiff. In an action under this clause of the act it was held that the evidence would warrant a finding that the injury was caused by the negligence of a person to whose orders the plaintiff was bound to conform and did conform, and that the injury resulted from having so conformed, and that the common employer was liable.

In Wild v. Waygood[1] the court of appeal held that the plaintiff was entitled to go to the jury, and that the defendant was liable under subsection 3 of section 1 of the English act of 1880, and that the plaintiff's injury was the result of conforming to the orders of one Duplea. Duplea and the plaintiff, while in the employ of the defendant, were engaged in constructing a lift in a house, and during the course of the work Duplea ordered the plaintiff to put a plank across the well of the lift and to stand upon it. The plaintiff did so, and while he was standing on the plank Duplea pulled the rope which started the lift, causing one end of the plank to fall, and the plaintiff, to save himself from falling down the well, caught hold of another rope, which pulled him up to the pulley and caused the injuries complained of. The defendant contended that the injury was not caused by conforming to the order of Duplea, and the lower court so

[1] (1892) 1 Q. B. 783.

decided; but the court of appeal reversed this judgment. Lindley, L. J., says on pages 793, 794: "What was it that produced the injury to the plaintiff? It was the joint effect of the plaintiff being on the plank and the carelessness of Duplea in pulling the string. Those two things are so connected that it is impossible to say that the injury was not caused by these two things; viz., negligence of the person giving the order, and conformity with the order. Under this state of things I think the section plainly applies, and I can not help thinking that the divisional court would have had no difficulty if it had not been for the last part of Lord Coleridge's judgment in Howard v. Bennett.[1] The decision of that case seems to be right enough, but that which is contained in the last part of Lord Coleridge's judgment I must say I can not agree to."

In Howard v. Bennett, just cited, it was held that the plaintiff was not entitled to a verdict, because the person to whose order he conformed was not a person to whose order he was bound to conform. The plaintiff worked on a calico-printing machine as a back-tenter, and one Dean worked on the same machine as a printer. The machine required two men to work it, and there were eleven such machines in the room, under a foreman. The plaintiff's duty was to keep the calico straight as it passed through the machine. Dean stood at the opposite end of the machine, and it was one of his duties to start it. At the time of the accident, Dean told the plaintiff to clean the blanket which went over the cylinder, and while the plaintiff was so engaged, with his fingers between the rollers and the cylinder, Dean, without warning, started the machine, and the plaintiff's fingers were cut off. It was held that Dean was merely a fellow workman, for whose neg-

[1] 58 L. J. (Q. B.) 129; 60 L. T. 152. See also, Whatley v. Holloway, 62 L. T. (N. S.) 639; 6 Times Law Rep. 353 (1890); Bunker v. Midland R. Co., 47 L. T. (N. S.) 476; 31 W. R. 231; Snowden v. Baynes, 25 Q. B. D. 193.

ligence the common employer was not liable under the act.

§ 127. Same—Indiana decisions.—In Indiana it has been held that a section-foreman of a railroad company is a person to whose orders an ordinary workman is bound to conform, and if injured by reason of conforming to his orders the injured employee may recover against the railroad company under the Employers' Liability Act.[1]

In Louisville &c. R. Co. v. Wagner, just cited, the plaintiff's arm was crushed by a truck slipping down skids upon him, while he was standing at the foot in obedience to the orders of the defendant's foreman, who had charge of the work of loading trucks. When the truck in question had been pushed about two-thirds of the way up the skids by other workmen, the foreman gave the order to "let her go," without warning the plaintiff, upon which the men let go of the truck and it was precipitated upon the plaintiff. It was held that the defendant was liable under this clause of the Employers' Liability Act; that in directing the plaintiff into a dangerous place and then ordering the truck turned loose upon him, without warning, the foreman was negligent, and that such negligence was the proximate cause of the plaintiff's injury.

In Hodges v. Standard Wheel Co. (Ind.)[2] the plaintiff was injured by the act of one Huey in failing to support some rims, whereby a pile of lumber fell upon the plaintiff. The foreman of the room in which both Huey and the plaintiff worked was temporarily absent in another part of the building, and had left general orders that Huey was to be obeyed by the others in that room during his absence. Huey ordered the plaintiff to assist him in

[1] Louisville &c. R. Co. v. Wagner, 153 Ind. 420; 53 N. E. 927 (1899); Thacker v. Chicago &c. R. Co., 159 Ind. —; 64 N. E. 605 (1902).

[2] 152 Ind. 680; 52 N. E. 391; 54 N. E. 383.

removing this lumber, and the accident happened while they were doing this work.

It was held that Huey was not a person to whose orders the plaintiff was bound to conform, within the meaning of the Employers' Liability Act, but was merely a fellow servant, for whose negligence the common employer was not liable, because the foreman could not delegate his duties in this matter to Huey without authority from the employer.

In Grand Rapids &c. R. Co. v. Petitt (Ind.)[1] it was decided that the clause of the Indiana Employers' Liability Act applies only to cases where the injured employee is acting under the special orders or directions of one to whose orders or directions he was bound to conform at the time of the accident, and that a brakeman, in discharging the ordinary duties of his position, can not be said to be acting under the special order of the conductor.[2] While coupling cars the plaintiff, a brakeman, was crushed between them, owing to the engineer moving the train faster instead of slower, as the plaintiff had signaled to another brakeman. This brakeman gave the wrong signal, and there were no special orders from the conductor, and the only thing the conductor said was, "Let us hurry up, boys, and get out of here." It was held that the defendant was not liable, because the only negligent act was committed by a fellow servant, to whose orders the plaintiff was not bound to conform.[3]

Indianapolis Gas Co. v. Schumack (Ind.)[4] decides that

[1] 27 Ind. App. 120; 60 N. E. 1000 (1901).

[2] In accord with this decision, see Mobile &c. R. Co. v. George, 94 Ala. 199; 10 So. 145; Evans v. Louisville &c. R. Co., 70 Miss. 527; 12 So. 581; Fenwick v. Illinois &c. R. Co., 40 C. C. A. 369; 100 Fed. 247.

[3] Citing New York &c. R. Co. v. Perriguey, 138 Ind. 114; 34 N. E. 233; 37 N. E. 976; Louisville &c. R. Co. v. Southwick, 16 Ind. App. 486; 44 N. E. 263.

[4] 23 Ind. App. 87; 54 N. E. 414 (1899).

it is not necessary that the plaintiff's injury should follow immediately upon the giving of the negligent order, by the person to whose orders the plaintiff was bound to conform. The accident was a gas explosion caused by the defendant's superintendent bringing a lighted lantern too near to a trench, where a leak in a gas-main was being repaired. The superintendent ordered the plaintiff and other workmen to repair this leak some time before the explosion, and he knew that the gas was escaping when he approached with the lantern. It was held that the plaintiff was entitled to recover.

The act of a foreman of a switching-crew in sending a second cut of cars down a track where he had ordered the plaintiff to couple some other cars, without warning the plaintiff that more cars were coming down that track or switch, constitutes negligence, for which the common employer is liable under the Indiana Employers' Liability Act, section 1, subdivision 2,[1] relating to the negligence of a person to whose orders the plaintiff was bound to conform.[2]

The circumstance that a person to whose orders the plaintiff is bound to conform also performs services like those performed by the plaintiff does not take such person out of the class for whose negligence the common employer is made liable by the Indiana Employers' Liability Act. Thus a railroad company is liable for the negligence of the foreman of a switching-crew which causes injury to a switchman, although the foreman was required to assist the crew in switching. The performance of the higher duties than those of a switchman brings him within the contemplation of the statute, and if his negligence be committed in the performance of such duties, the injured employee may recover therefor. "We think the general

[1] Burns R. S. 1901, § 7083, cl. 2.

[2] Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633; 62 N. E. 295 (1901).

rule under the Employers' Liability Act," says Mr. Justice Wiley, "is that where one in the service of a railroad, or other corporation, has power and authority to direct and control the work of another employee, the former must be regarded as the superior of the latter, and not a fellow servant. In such case the negligence of the superior is the negligence of the corporation."[1]

Before the passage of the Employers' Liability Act it was well settled in Indiana that all employees who were subject to the same general control and co-operating in the prosecution of the same general end and purpose were coemployees or fellow servants, without regard to their relative rank, and that their common employer was not liable to any one of them for a personal injury caused by the negligence of another. This was deemed to be a risk which the injured employee assumed by entering the service, although the injured employee was bound to conform to the orders of the negligent coemployee.[2]

Prior to the passage of the Employers' Liability Act it was settled law in Indiana—

That a "bank-boss" in charge of a coal mine, with the duty to superintend the mine and its entire workings, and to keep the rooms, entrances and openings of the mine in safe condition, was not a vice-principal, but merely a fellow servant with a boy of nineteen years of age hired to dig coal.[3]

That a foreman or boss was, generally speaking, a fel-

[1] Terre Haute &c. R. Co. v. Rittenhouse, 28 Ind. App. 633; 62 N. E. 295, 297, 298; citing Pierce v. Van Dusen, 24 C. C. A. 280; 78 Fed. 693; Woodward Iron Co. v. Andrews, 114 Ala. 243; 21 So. 440; Millward v. Midland R. Co., 14 Q. B. D. 68.

[2] Indiana Car Co. v. Parker, 100 Ind. 181; Atlas Engine Works v. Randall, 100 Ind. 293; 50 Am. R. 798; Brazil &c. Coal Co. v. Cain, 98 Ind. 282; Gormley v. Ohio &c. R. Co., 72 Ind. 31.

[3] Brazil &c. Coal Co. v. Cain, 98 Ind. 282 (1884).

low servant with those working under him, and to whose orders they were bound to conform.[1]

That an agent or foreman with authority to control the work of the plaintiff and other servants of the defendant, and to employ and discharge them, was a fellow servant with respect to the plaintiff who was hired to do general work in the defendant's coke-yards.[2]

That a master mechanic of a railroad company was a fellow servant with a locomotive-fireman.[3]

That a train-dispatcher was a fellow servant with a brakeman.[4]

That an engineer in charge of a locomotive was a fellow servant with a man cleaning the locomotive, and at common law the employer was not liable for the negligent act of the engineer in starting the locomotive while the cleaner was doing his work under the boiler.[5]

[1] Indiana Car Co. v. Parker, 100 Ind. 181, 183 (1884); Drinkout v. Eagle Machine Co., 90 Ind. 423 (1883); Boyce v. Fitzpatrick, 80 Ind. 526 (1881); Sullivan v. Toledo &c. R. Co., 58 Ind. 26 (1877); Ohio &c. R. Co. v. Tindall, 13 Ind. 366; 74 Am. D. 259 (1859).

[2] New Pittsburg Coal &c. Co. v. Peterson, 136 Ind. 398; 35 N. E. 7; 14 Ind. App. 634; 43 N. E. 270; 43 Am. St. 327; Peterson v. New Pittsburg Coal &c. Co., 149 Ind. 260; 49 N. E. 8; 63 Am. St. 289 (1897). In this case the defendant conducted an extensive business through a general superintendent, who selected a foreman for each of the departments. At the time of the accident, the plaintiff was acting pursuant to directions from the foreman of the coke department, who was assisting in the work of removing ice from an elevator.

[3] Columbus &c. R. Co. v. Arnold, 31 Ind. 174.

[4] Robertson v. Terre Haute &c. R. Co., 78 Ind. 77; 41 Am. R. 552.

[5] Spencer v. Ohio &c. R. Co., 130 Ind. 181; 29 N. E. 915.

CHAPTER VII.

OBEDIENCE TO RULES AND REGULATIONS AND INSTRUCTIONS.

SECTION
128. Negligence of person in obedience to rules and regulations, etc.
129. Violation of rule by employee and abandonment of rule by employer.

§ 128. Negligence of person in obedience to rules and regulations, etc.—The fourth subdivision of the Alabama Employers' Liability Act imposes a liability upon the employer:

"4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf."[1]

In Laughran v. Brewer (Ala.)[2] the plaintiff's injury was alleged to have been caused by the omission of the engineer in charge of a stationary engine in a shop to obey the rules and regulations of the defendant, and by some failures or omissions to obey the rules in other respects. The supreme court held that the statute made the master responsible for his instructions if injury was occasioned by obedience to them, but that he was not liable to an employee for an injury caused by the disobedience of a coemployee, and that the plaintiff in the case at bar could

[1] Ala. code 1896, § 1749, cl. 4.
[2] 113 Ala. 509; 21 So. 415 (1897).

not recover. A like rule prevails under the Indiana and English Employers' Liability Acts.[1]

In Louisville &c. R. Co. v. Mothershed (Ala.)[2] a locomotive-engineer was killed while passing a station at a high rate of speed by colliding with another train which had been left standing on the same track. The conductor in charge of the latter train had failed to send a flagman back to warn approaching trains, and his negligence was relied upon to sustain a verdict against the common employer under the Employers' Liability Act. A rule of the railroad company, to which the deceased had assented only eight days before the accident, required engineers to keep their trains under control when approaching time-table stations. It was held, as matter of law, that the engineer was guilty of contributory negligence, and that the evidence did not warrant a finding that the rule had been waived by the defendant.

In some lines of employment, especially in railroading, it is a part of the common-law duty of the employer to adopt and promulgate rules and regulations for the guidance of employees, and a failure or neglect to do so may render the employer liable to an employee injured by such breach of duty.

In Chicago &c. R. Co. v. McGraw (Colo.)[3] a railroad company was held negligent in failing to adopt and promulgate more specific rules for the guidance of its employees, tending to insure their safety, with reference to the use of a blue flag in signaling.

§ 129. Violation of rule by employee and abandonment of rule by employer.—If an employee is injured while acting in known violation of a reasonable rule of his em-

[1] Thacker v. Chicago &c. R. Co., 159 Ind. —; 64 N. E. 605 (1902); Whatley v. Holloway, 62 L. T. (N. S.) 639; s. c. in court of appeal, 6 Times Law Rep. 353 (1890).

[2] 110 Ala. 143; 20 So. 67.

[3] 22 Colo. 363; 45 Pac. 383 (1896).

ployer, he can not recover damages therefor unless there was some emergency which was not contemplated by the rule.[1] This defense generally falls under the head of contributory negligence, and sometimes under assumption of risk.

The mere habit of employees to disregard a reasonable rule will not justify a finding that the rule has been abandoned by the employer. Knowledge of such disregard of a rule must be brought home to the employer, or to some one whose duty it is to take action, and is authorized to bind the employer. Such knowledge may be shown either by direct proof or by circumstances.[2]

In Alabama &c. R. Co. v. Richie (Ala.)[3] it was decided that the fact that an employer has abandoned a rule forbidding employees from getting between moving cars to uncouple them does not show that a plaintiff is in the exercise of due care in doing the work in this way. "A mere question of convenience, or of saving time," says Mr. Justice Coleman, "no other pressing interest being involved, will not justify a disregard of the rule."[4]

When emergencies arise requiring prompt action, a rule of this nature may be violated without showing contributory negligence, or assumption of risk.[5]

In Terre Haute &c. R. Co. v. Pruitt (Ind.)[6] it was held

[1] Brown v. Louisville &c. R. Co., 111 Ala. 275; 19 So. 1001 (1896); Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283; Richmond &c. R. Co. v. Thomason, 99 Ala. 471; 12 So. 273; Louisville &c. R. Co. v. Markee, 103 Ala. 160; 15 So. 511; 49 Am. St. 21; Terre Haute &c. R. Co. v. Pruitt, 25 Ind. App. 227 (1900). See also, index title, "Contributory Negligence."

[2] Alabama &c. R. Co. v. Roach, 110 Ala. 266; 20 So. 132 (1896).

[3] 111 Ala. 297; 20 So. 49 (1896).

[4] Alabama &c. R. Co. v. Richie, supra, at p. 301.

[5] Alabama &c. R. Co. v. Richie, 111 Ala. 297; 20 So. 49 (1896); Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283; Georgia Pac. R. Co. v. Davis, 92 Ala. 300; 9 So. 252; 25 Am. St. 47.

[6] 25 Ind. App. 227; 57 N. E. 949 (1900).

that a rule of a railroad company requiring brakemen to examine hand-holds, etc., is reasonable.

A rule which is habitually violated to the knowledge of the defendant is not binding upon a plaintiff injured while acting contrary to the terms of the rule. Thus, a sign on the front of a street-railway car forbidding passengers to ride on the front platform does not relieve the street-railway company from liability for negligence resulting in an accident to a passenger riding on the front platform if it appears that the company's conduct justified the belief that the rule was not in force.[1] In delivering the opinion of the court in this case Mr. Justice Knowlton says (page 579): "We have no doubt that the railroad company after making a rule in regard to the conduct of passengers may waive and abandon it and treat passengers as if it had never existed, and thus lead them to believe that the rule is no longer in force. If the railroad company does this it can not set up the rule to defeat the rightful claim of the passenger who has acted in the well-warranted belief that the rule was not in force."[2]

Such a rule prohibiting riding on the front platform is, however, a reasonable rule, and if the passenger intentionally violates it he is not entitled to recover for an injury sustained while standing upon the platform, in case the rule is still in force and has not been waived by the company.[3]

In New York, Iowa, Kansas and other jurisdictions it has also been decided that if the defendant's rules are habitually violated, an employee, as well as a passenger,

[1] Sweetland v. Lynn &c. R. Co., 177 Mass. 574; 59 N. E. 443.

[2] Citing Chicago &c. R. Co. v. Lowell, 151 U. S. 209; 14 S. Ct. 281; Directors &c. v. Slattery, 3 App. Cas. 1155; Jones v. Chicago &c. R. Co., 43 Minn. 279; 45 N. W. 444; New York &c. R. Co. v. Ball, 53 N. J. L. 283, 286; 21 Atl. 1052 (1891).

[3] Dodge v. Boston &c. Co., 148 Mass. 207; 19 N. E. 373; 12 Am. St. 541; 2 L. R. A. 83; O'Neill v. Lynn &c. R. Co., 155 Mass. 371; 29 N. E. 630; Wills v. Lynn &c. R. Co., 129 Mass. 351.

who is injured while acting contrary to the rule in question, may recover damages.[1]

When the rules of a street-railway company require its cars to go over a certain frog at a rate not exceeding four miles an hour, it is evidence of negligence on the part of the railroad company in an action brought against it by a passenger that the car in question passed over the frog at a rate of twelve or fifteen miles an hour.[2]

[1] Sprong v. Boston &c. R. Co., 58 N. Y. 56 (1874); Whittaker v. President &c., 126 N. Y. 544; 27 N. E. 1042; Hayes v. Bush &c. Mfg. Co., 41 Hun (N. Y.) 407; Reed v. Burlington &c. R. Co., 72 Iowa 166; 33 N. W. 451; 2 Am. St. 243; Kansas City &c. R. Co. v. Kier, 41 Kan. 661; 21 Pac. 770; 13 Am. St. 311; Barry v. Hannibal &c. R. Co., 98 Mo. 62; 11 S. W. 308; Alexander v. Louisville &c. R. Co., 83 Ky. 589; Fay v. Minneapolis &c. R. Co., 30 Minn. 231; 15 N. W. 241.

[2] Sweetland v. Lynn &c. R. Co., 177 Mass. 574; 59 N. E. 443.

CHAPTER VIII.

ATTRIBUTES PECULIAR TO INJURIES RESULTING IN DEATH.

SECTION

130. Statutes and scope of chapter.
131. General effect of these clauses.
132. No action for death at common law—Early statutes.
133. Survival of action when death is not instantaneous, or is preceded by conscious suffering.
134. Release and discharge by employee, or by widow, or by next of kin.
135. Survival of action when death is instantaneous or without conscious suffering.
136. Survival of action in favor of non-residents.
137. Where employee who has consciously suffered leaves no widow or dependent next of kin.
138. What constitutes instantaneous death, or death without conscious suffering.
139. Concurring causes of death, for one of which defendant is not culpable.
140. Claim for damages as ground for administration.
141. Same.
142. Who may sue when employee dies before action is brought.
143. Same.
144. Former judgment as a bar to action.
145. Domestic administrator's right to sue for injury received in another state.
146. Foreign administrator's right to sue.
147. Same—Author's view.
148. Who are "dependent" upon the employee.
149. Action by dependent in Massachusetts.
150. Following death-money as trust funds.

§ 130. Statutes and scope of chapter.—The Massachusetts Employers' Liability Act, in its present form in the revised laws of 1902, chapter 106, provides:

"Section 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous, or is preceded by conscious suffering, and if there is any person who would have

been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

"Section 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section 71, an employee is instantly killed, or dies without conscious suffering, his widow, or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer."

The New York Employers' Liability Act of 1902, chapter 600, declares:

"Section 1, clause 2. * * * In case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee suing under the provisions of this act.

"Section 5. Every existing right of action for negligence, or to recover damages for injuries resulting in death, is continued, and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section 2 of this act be a bar to the maintenance of a suit upon any such existing right of action."

The statutes of the other states contain similar provisions, and many states have statutes giving a right of action

for death caused by wrongful act, neglect or default of the defendant.

Under these acts the fact that the death does not occur within a year and a day after the injury, does not show that the death was not *caused* by the defendant, nor preclude a recovery of damages. The common-law rule respecting prosecutions for murder, appeals of death, and inquisitions against deodands, does not apply to the private right of action conferred by these acts.[1]

This chapter treats (1) of the survival of actions; (2) of the proper person to bring suit when the employee dies before action brought; (3) of what persons are entitled to the proceeds of the suit, if any; (4) of the release of damages; (5) whether a claim for damages under the act is ground for granting administration (6) who are "dependents" within the terms of the statute. It relates to certain attributes which are peculiar to injuries resulting in death.

§ 131. General effect of these clauses.—The Massachusetts act distinguishes between a death with conscious suffering and a death without conscious suffering, but the New York act does not draw any distinction between the two forms of death.

Some important consequences flow from this distinction in Massachusetts. The effect under the Massachusetts act "is to give a right of recovery whenever a person is instantly killed or dies without conscious suffering as the result of any negligence of the employer himself, but not to give the right when a death occurs from the negligence of an employee, unless the negligence is of a kind which would subject the employer to a liability under the first

[1] Louisville &c. R. Co. v. Clarke, 152 U. S. 230; 14 S. Ct. 579 (1894); Western &c. R. Co. v. Bass, 104 Ga. 390; 30 S. E. 874 (1898).

section of the statute if the deceased person had been injured and had survived."[1]

In Welch v. Grace (Mass.)[2] the plaintiff's husband, while removing an unexploded dynamite cartridge from a rock, was instantly killed by its explosion. The deceased had worked in the defendant's quarry for about three years, and had had some experience in loading and discharging small blasts. On the day of the accident he told the defendant that there were two or three cartridges frozen in a hole, which he could not get out. The defendant instructed him to pour some hot water into the hole. The deceased poured hot water into the hole, and fifteen or twenty minutes later put an iron spoon into the hole, when the explosion occurred. It was held that the evidence would not warrant a finding that the defendant was personally negligent, either on the subject of instructions or on the subject of furnishing proper tools or appliances, and that the plaintiff could not recover under the Employers' Liability Act.

Welch v. New York &c. R. Co. (Mass.)[3] was an action under the act for the conscious suffering and death of the plaintiff's son, who was a switchman in the defendant's employ. It was the duty of the deceased to signal to the "tower-man" which switch was needed to be thrown in making up trains in the yard. He gave the signal for track No. 1, but the tower-man switched the train on to another track and injured the deceased. It was held that the tower-man was a person in "charge or control" of a switch within the meaning of the act, and that there was sufficient evidence of his negligence to justify a verdict against the defendant.

[1] Welch v. Grace, 167 Mass. 590, 592; 46 N. E. 387, per Knowlton, J.
[2] 167 Mass. 590; 46 N. E. 387.
[3] 176 Mass. 393; 57 N. E. 668 (1900); s. c. on second appeal, 182 Mass. —; 64 N. E. 695 (1902).

§ 132. No action for death at common law—Early statutes.—Irrespective of statute, no action can be maintained for a personal injury resulting in death, whether the death is caused by the negligence of an employer or any one else. At common law, the death of a human being was not considered a proper ground of an action for damages.[1]

A like rule applies in the admiralty courts; and it is well settled that, in the absence of an act of congress or of a state statute giving a right of action for the negligent killing of a human being on the high seas or on waters navigable from the sea, no suit can be maintained in admiralty therefor.[2]

This rule of the common law has been modified or changed by statute in England and in nearly all the states. In the case of Insurance Co. v. Brame,[3] Mr. Justice Hunt says for the court: "By the common law actions for injury to the person abate by death, and can not be revived or maintained by the executor or the heir. By the act of parliament of August 21, 1846, 9 and 10 Vict.,[4] an action in certain cases is given to the representatives

[1] Carey v. Berkshire R. Co., 1 Cush. (Mass.) 475; 48 Am. D. 616; Connecticut Mut. Ins. Co. v. New York &c. R. Co., 25 Conn. 265; 65 Am. D. 571; Eden v. Lexington &c. R. Co., 14 B. Mon. (Ky.) 204; Worley v. Cincinnati &c. R. Co., 1 Handy (Ohio) 481; Hubgh v. New Orleans &c. R. Co., 6 La. An. 495; 54 Am. D. 565; Hermann v. Carrollton R. Co., 11 La. An. 5; Green v. Hudson River R. Co., 2 Keyes (N. Y.) 294; Kramer v. San Francisco &c. R. Co., 25 Cal. 434; Indianapolis &c. R. Co. v. Keely, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Stewart v. Louisville &c. R. Co., 83 Ala. 493, 495; 4 So. 373; Harris v. McNamara, 97 Ala. 181, 182; 12 So. 103; Grosso v. Delaware &c. R. Co., 50 N. J. L. 317; 13 Atl. 233; Insurance Co. v. Brame, 95 U. S. 754; The Harrisburg, 119 U. S. 199; 7 S. Ct. 140; Baker v. Bolton, 1 Camp. 493. Contra, James v. Christy, 18 Mo. 162; Shields v. Yonge, 15 Ga. 349; 60 Am. D. 698; McDowell v. Georgia R. Co., 60 Ga. 320.

[2] The Harrisburg, 119 U. S. 199; 7 S. Ct. 140; The Alaska, 130 U. S. 201; 9 S. Ct. 461; The Corsair, 145 U. S. 335; 12 S. Ct. 949.

[3] 95 U. S. 754, 759.

[4] Known as Lord Campbell's Act, being cap. 93 of 9 and 10 Victoria.

of the deceased. This principle, in various forms and with various limitations, has been incorporated into the statutes of many of our states."

Under the Massachusetts statute of 1842, providing that "the action of trespass on the case for damage to the person shall hereafter survive," it has been held that the executor or administrator of a person negligently killed by the defendant may maintain an action therefor when the death was not instantaneous,[1] but could not maintain such an action when the death was instantaneous,[2] for the reason that the statute supposes the deceased to have been once entitled to an action himself.

The fact that the deceased remained in an unconscious condition from the time of his injury to his death does not prevent a recovery by his executor or administrator, under the act of 1842, if the death was not instantaneous. No damages can be recovered for his physical or mental suffering, as he is deemed to have had none during his unconsciousness; but damages may be recovered for the expenses of illness and loss incurred before death by reason of the negligence.[3]

When the survival of an action to the executor or administrator depends upon the fact that the death was not instantaneous, the burden of proving that fact rests upon the plaintiff.[4]

[1] Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478; Bancroft v. Boston &c. R. Co., 11 Allen (Mass.) 34.

[2] Kearney v. Boston &c. R. Co., 9 Cush. (Mass.) 108; Moran v. Hollings, 125 Mass. 93.

[3] Bancroft v. Boston &c. R. Co., 11 Allen (Mass.) 34. For death caused by negligence of non-employer, see Mass. Rev. laws 1902, ch. 171, § 2; for death caused by negligence of railroad, see Rev. laws, ch. 111, § 267; for death caused by defect in highway, see Rev. laws, ch. 51, § 17.

[4] Corcoran v. Boston &c. R. Co., 133 Mass. 507; Riley v. Connecticut River R. Co., 135 Mass. 292.

§ 133. Survival of action when the death is not instantaneous, or is preceded by conscious suffering.—The various Employers' Liability Acts change the rule of the common law relating to the survival of actions, and provide that the right of action given thereby shall survive to the personal representative of the deceased employee, or to some member of his family.

The Massachusetts act recognizes two kinds of death, and attaches different consequences to them. The first section relates to a death which is not instantaneous, or is preceded by conscious suffering,[1] and reads as follows: "In case the injury results in death, the legal representatives of such employee shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work." The above section of the original act was amended by the act of 1892, chapter 260, section 1, by adding the following words: "And in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may, in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

[1] Daly v. New Jersey Steel &c. Co., 155 Mass. 1, 3; 29 N. E. 507.

The effect of these two sections is to empower the "legal representatives" of the deceased employee to sue and recover damages for the conscious suffering of the deceased from the time of the injury to his death; and also, if he left a widow, or dependent next of kin, to recover damages for such death as a substantive cause of action. Under the original act of 1887, a death preceded by conscious suffering was not a substantive cause of action, and the executor or administrator could not recover damages for such death itself, but could recover only for his conscious suffering.[1] The amendment of 1892, therefore, increases the liability of the employer.

Under these sections the damages recovered for the conscious suffering of the deceased seem to constitute assets of his estate, and are therefore subject to the claims of his creditors, and to the operation of his will. The damages recovered for the death itself, however, seem to form no part of the assets of the estate, but to belong to the widow, or dependent next of kin, as being the persons entitled under the succeeding sections of the act. Even in this case, however, the action must be brought in the name of the personal representative.

§ 134. Release and discharge by employee, or by widow, or by next of kin.—In Vermont an agreement by which the next of kin of a person seeking employment releases the employer from liability for negligence resulting in death, is contrary to public policy and void.[2]

Under the Minnesota act, giving a right of action to the personal representative of a person killed by negligence, for the benefit of the widow and next of kin, it has been decided that where the deceased leaves no widow, a

[1] Ramsdell v. New York &c. R. Co., 151 Mass. 245; 23 N. E. 1103; 7 L. R. A. 154; Clark v. New York &c. R. Co., 160 Mass. 39; 35 N. E. 104.

[2] Tarbell v. Rutland R. Co., 73 Vt. 347; 51 Atl. 6; 56 L. R. A. 656 (1901).

release given by the next of kin will bar an action by the administrator.[1]

Under a like statute of Nebraska, a release given by the widow before her appointment as administratrix has been held to bar her right to recover damages for herself, but not for the children, as next of kin.[2]

Under the New York statute, giving a right of action to the executor or administrator for the benefit of the widow, husband and next of kin of one killed by the wrongful act, neglect or default of the defendant, it has been held that a release signed by a brother-in-law before his appointment as administrator was no bar to an action for the death brought after his appointment; but that if the money received was expended for the expenses of funeral and burial, the defendant was entitled to credit therefor.[3]

Parol evidence to vary the terms of a release is sometimes admissible and sometimes not.[4] In Indiana a distinction is taken between the case when the consideration of the release is contractual, and, on the other hand, where the consideration is not contractual. If the release states a contractual consideration, parol evidence is not admissible to vary or contradict the consideration expressed; but if the consideration is expressed merely as a recital of a precedent or contemporaneous fact, parol evidence is admissible to prove that the fact recited is untrue and that the recited consideration was not paid at all, or was paid on a different account. These rules apply to actions under the Employers' Liability Act as well as to other classes.[5]

[1] Sykora v. Case Threshing Machine Co., 59 Minn. 130; 60 N. W. 1008.

[2] Chicago &c. R. Co. v. Wymore, 40 Neb. 645; 58 N. W. 1120.

[3] Stuber v. McEntee, 142 N. Y. 200; 36 N. E. 878.

[4] Galvin v. Boston &c. R. Co., 180 Mass. 587; 62 N. E. 961 (1902); Pennsylvania Co. v. Dolan, 6 Ind. App. 109; 32 N. E. 802; 51 Am. St. 289 (1892).

[5] Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943, 947; Stewart v. Chicago &c. R. Co., 141 Ind. 55; 40 N. E. 67; Pickett

A release executed by an employee of a railroad company, reciting the receipt of $25 and an agreement by the railroad company to pay certain fees and charges of physicians and hospital, and a cash payment to the employee, as the consideration, expresses a contractual consideration which can not be contradicted by parol evidence that the $25 paid was a gratuity, in the absence of fraud or mutual mistake. "The consideration on each side," says Mr. Justice Baker, for the court, "was the mutual covenants of the other."[1]

Under the Indiana act for wrongful death, a release given by the widow of the deceased will not bar a recovery for the use of his child.[2] This statute gives the right of action, not for the benefit of the estate of the deceased, but as a source of compensation for the persons injured by the wrongful act of the defendant.[3]

A release signed by an employee, in consideration that his employer would furnish him care and medical attendance, while the employee is so far under the influence of narcotics and the effects of his injury as not to comprehend that he was making a settlement of his claim for damages, is not binding upon him, and he may recover damages without first returning the amount paid by the employer for care and medical attendance; but the jury should give the defendant credit for this amount.[4]

As to what facts will or will not authorize a finding that the release of the plaintiff's personal injury was obtained by fraud or false representation by the defendant or by the defendant's agent, see the cases cited in the note.[5]

v. Green, 120 Ind. 584; 22 N. E. 737; Reisterer v. Carpenter, 124 Ind. 30; 24 N. E. 371.

[1] Indianapolis &c. R. Co. v. Houlihan, 157 Ind. 494; 60 N. E. 943, 948 (1901).

[2] Pittsburg &c. R. Co. v. Moore, 152 Ind. 345; 53 N. E. 290 (1899).

[3] Hilliker v. Citizens' St. R. Co., 152 Ind. 86; 52 N. E. 607.

[4] Colorado City v. Liafe, 28 Colo. 468; 65 Pac. 630 (1901).

[5] Bliss v. New York &c. R. Co., 160 Mass. 447; 36 N. E. 65; 39 Am.

For cases relating to the right of an employee to waive the benefit of the Employers' Liability Act by contract or agreement made before his injury is received, and the effect of such a contract upon his widow or next of kin in case he is killed, see sections 7 and 8, ante.

§ 135. Survival of action when death is instantaneous or without conscious suffering.—The second section of the Massachusetts act of 1887 relates to the case of an employee who is "instantly killed or dies without conscious suffering," and, in its present form in the revised laws of 1902, ch. 106, § 73, is quoted in section 130, ante.

Damages recovered under this section are no part of the assets of the estate of the deceased. They are not subject to the operation of his will, nor can they be taken in payment for his debts. They belong exclusively to the widow, or, if there is no widow, to the dependent next of kin.

The American statutes corresponding to Lord Campbell's Act have been uniformly construed in this way. Even when the statute declares that the action shall be brought in the name of the personal representative of the deceased, the damages constitute no part of his estate, if the statute declares that they shall inure to the benefit of the widow or next of kin.[1]

Speaking of similar statutory provisions of Connecticut, Mr. Justice Barker says for the court in Higgins v. Central New England R. Co. (Mass.):[2] "The effect of such provisions as to the distribution of the damages is to say that they shall not be assets for the payment of debts, and shall not pass by the will of the deceased, but

St. 504; McGuire v. Lawrence Mfg. Co., 156 Mass. 324; 31 N. E. 3; Drohan v. Lake Shore &c. R. Co., 162 Mass. 435; 38 N. E. 1116; Nebeker v. Cutsinger, 48 Ind. 436; Guldager v. Rockwell, 14 Colo. 459; 24 Pac. 556 (1890).

[1] Stuber v. McEntee, 142 N. Y. 200; 36 N. E. 878.

[2] 155 Mass. 176, 181; 29 N. E. 534; 31 Am. St. 544.

shall be applied to the compensation of the persons who are presumed to have suffered the most by the death of the person injured."

§ 136. Survival of action in favor of non-residents.— Some conflict exists upon the question whether a right of action survives in favor of a non-resident of the state of injury.

In Mulhall v. Fallon (Mass.)[1] an employee of the defendant was killed in Massachusetts without conscious suffering. His mother, as next of kin dependent, brought this action under the Employers' Liability Act. She was an Irish woman, and so far as appeared had never left Ireland. It was held that she was entitled to the benefit of the statute, upon the ground that a state may confer rights upon non-resident aliens, although it can not impose duties upon them, and upon the further ground as stated by Chief Justice Holmes (page 269), as follows: "Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain.[2] In the latter case there would be no exception to the right of recovery if the next of kin were non-resident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical, and when the different provisions are part of one scheme. In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is to be brought by them or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the em-

[1] 176 Mass. 266; 57 N. E. 386.
[2] Mass. Stats. 1887, ch. 270, § 1, cl. 3.

ployer or negligent person. In other words, it is primarily a penalty for the protection of the life of a workman in this state. We can not think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state we can not believe that so large an exception was silently left to be read in. Whether if the statute were of a different kind we could make a distinction between a mother living just across the boundary line between Massachusetts and Rhode Island and one living in Ireland, need not be considered now."

The fact that the plaintiff is a non-resident of the state of injury does not prevent a recovery under the statutes of most states.[1] In Pennsylvania and some other jurisdictions, however, it has been held that a non-resident alien was not entitled to the benefit of a statute giving a right of action for death resulting from negligence committed therein.[2]

In Massachusetts and some other jurisdictions a distinction has been taken between a case where the statute confers a new right of action for the death upon the executor or administrator of the deceased, and, on the other hand, where the statute confers a right of action upon the deceased himself which goes to the executor by survival only.[3] If the cause of action existed in the de-

[1] Chicago &c. R. Co. v. Mills, 57 Kan. 687; 47 Pac. 834; Augusta R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; Chesapeake &c. R. Co. v. Higgins, 85 Tenn. 620; 4 S. W. 47; Philpott v. Missouri Pac. R. Co., 85 Mo. 164; Luke v. Calhoun Co., 52 Ala. 115, 118, 120; Vetaloro v. Perkins, 101 Fed. 393.

[2] Deni v. Pennsylvania R. Co., 181 Pa. St. 525; 37 Atl. 558; 59 Am. St. 676; Brannigan v. Union Gold Mining Co., 93 Fed. 164; Adam v. British & Foreign Steamship Co., 79 L. T. (N. S.) 31.

[3] Mulhall v. Fallon, 176 Mass. 266, 268; 57 N. E. 386; Bruce v. Cincinnati &c. R. Co., 83 Ky. 174, 182; Blake v. Midland R. Co., 21 L. J. Q. B. 233, 237; Seward v. Owners of "Vera Cruz," 10 App. Cas. 59, 67.

ceased and survives by the statute of the state of injury, an action may be maintained thereon in another state by an executor or administrator appointed therein.[1] But, according to this distinction, if the statute of the state of injury confers a new right of action upon the executor, which could not exist in the deceased, no action can be maintained thereon in another state, whether the executor be foreign or domestic.[2]

In most jurisdictions, however, this distinction is either accidentally overlooked or purposely disregarded, and the general rule is that the action may be maintained in another state by the legal representative appointed under its authority.[3]

§ 137. Where employee who has consciously suffered leaves no widow or dependent next of kin.—In such case the Massachusetts act, as amended by the act of 1892, chapter 260, section 1, expressly provides that "no damages for such death shall be recovered." The theory of the statute is that an employee's widow, or his dependent next of kin, has such an interest in his life as to render the employer liable in damages to either the widow or such next of kin for negligence causing his death. But if the employee leaves neither a widow nor dependent next of kin, then there is no person who has such an interest in his life as equitably to entitle him to a right of action against the employer for the death itself. The ad-

[1] Higgins v. Central &c. R. Co., 155 Mass. 176; 29 N. E. 534; 31 Am. St. 544.

[2] Richardson v. New York Central R. Co., 98 Mass. 85; Buckles v. Ellers, 72 Ind. 220; 37 Am. R. 156; Taylor v. Pennsylvania Co., 78 Ky. 348; 39 Am. R. 244; Woodard v. Michigan &c. R. Co., 10 Ohio St. 121; McCarthy v. Chicago &c. R. Co., 18 Kan. 46.

[3] Dennick v. Railroad Co., 103 U. S. 11; 8 Am. & Eng. Encyc. Law (2d ed.) 879, and cases cited.

ministrator, however, may maintain an action for the conscious suffering of the deceased.[1]

Where a statute of this kind gives a right of action to the personal representative of the deceased for the exclusive benefit of the widow or next of kin, no action can be maintained if such persons do not exist, even if the statute omits to declare that no damages shall be recoverable in such case.[2] The burden is also upon the plaintiff to show that the deceased left a widow or next of kin.

Under the Alabama Employers' Liability Act, however, which provides that the damages recovered by the personal representative of the deceased employee "shall be distributed according to the statute of distributions," it has been decided that the executor or administrator need not allege that the deceased left any heirs at law or next of kin, as that is a matter of defense, and, in the absence of evidence to the contrary, it will be presumed that he left such heirs or next of kin.[3] It seems, also, that the executor or administrator may recover nominal damages even when the proof shows that the deceased left no heirs or next of kin.[4]

§ 138. What constitutes instantaneous death, or death without conscious suffering.—Where a brakeman is knocked from the top of a freight-car by a bridge, evidence that the speed of the train was about twenty miles an hour, and the lesions upon his head were sufficient to produce instant death, and that the defendant's workmen

[1] Ante, § 133.

[2] Commonwealth v. Eastern R. Co., 5 Gray (Mass.) 473; Indianapolis &c. R. Co. v. Keely, 23 Ind. 133; Chicago &c. R. Co. v. Morris, 26 Ill. 400; State v. Gilmore, 4 Foster (N. H.) 461; Lyons v. Cleveland &c. R. Co., 7 Ohio St. 336; 70 Am. D. 75; Lucas v. New York &c. R. Co., 21 Barb. (N. Y.) 245.

[3] James v. Richmond &c. R. Co. 92 Ala. 231; 9 So. 335; Columbus &c. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90.

[4] James v. Richmond &c. R. Co., 92 Ala. 231; 9 So. 335.

who picked up the dead body were not called as witnesses, will justify the jury in finding that he died instantly, or without conscious suffering.[1]

In Mears v. Boston &c. R. Co. (Mass.),[2] the plaintiff's husband, a car-inspector in the defendant's employ, was crushed by a car while in the performance of his duty. The testimony tended to show that his body was crushed, and one witness, who was near him at the time, stated that he was "stone-dead" when the witness reached him, though the same witness also testified that the deceased took two or three steps after he was struck and then fell. In this action under the statute by his widow, it was held that the evidence would warrant a finding that he died without conscious suffering.

Where, however, the proof leaves to conjecture whether the deceased regained consciousness or not, the next of kin can not recover, as the burden is upon the plaintiff to prove that he died instantly, or without conscious suffering. Thus, in Hodnett v. Boston &c. R. Co. (Mass.)[3] an employee was killed by being struck on the back of the head by the end-sill of a dump-car going ten or twelve miles an hour, and bounced against a stationary car. The blood gushed from his mouth and nose in streams; he was apparently unconscious when picked up, and he was injured at 11 A. M. and died at 1 P. M. There was no evidence that from the nature of his injuries he was unlikely to regain consciousness. It was held that the evidence was not sufficient to warrant a finding that the employee died without conscious suffering.[4]

[1] Maher v. Boston &c. R. Co., 158 Mass. 36; 32 N. E. 950.
[2] 163 Mass. 150; 39 N. E. 997.
[3] 156 Mass. 86; 30 N. E. 224.
[4] See also, Martin v. Boston &c. R. Co., 175 Mass. 502; 56 N. E. 719 (1900).

§ 139. Concurring causes of death, for one of which defendant is not culpable.—Where the negligent act, for which the defendant is liable under the Employers' Liability Act, is a sufficient cause to produce death, the defendant can not escape liability by proof that there was another subsequent cause which was also sufficient to produce death, for which he was not responsible.

In Thompson v. Louisville R. Co. (Ala.)[1] a brakeman, while working on a hand-car under the charge or control of one McPherson, was injured through the negligence of McPherson in attempting to stop the car by using a shingle. His attending physicians testified that the injury so received was mortal, and would have produced death without any other cause. A few days after this injury, however, his wife, by mistake, administered to him internally several grains of the poison, corrosive sublimate, which the physician had prescribed as a wash for his wounds. Other physicians testified that the wounds were not necessarily fatal, but that they accelerated his death from the effects of the poison. The poison was the immediate cause of the death. It was held that a charge to the jury to find for the defendant if they believed that the deceased died from the effects of the poison, though the death was accelerated by his injuries, was erroneous, for the reason that the defendant could not shelter itself under the plea of a new intervening cause when its own wrongful act was the original and sufficient cause thereof.

In Sauter v. New York Central R. Co. (N. Y.)[2] the plaintiff's intestate was severely injured by reason of the negligence of the defendant, and there was evidence that the injury would have resulted in death even without the intervening negligence of a surgeon who made a mistake in performing an operation. The death was the immedi-

[1] 91 Ala. 496; 8 So. 406.
[2] 66 N. Y. 50; 23 Am. R. 18.

ate result of the operation, but as it appeared that the deceased acted in good faith in employing the surgeon, and the surgeon himself was competent, it was held that the railroad company was liable, and that the error of the surgeon was no shield for the defendant's own negligence.

§ 140. Claim for damages as ground for administration.—Where the statute of the state of injury and of process requires an action for the negligent killing of a human being to be brought in the name of the personal representative of the deceased, such claim for damages is sufficient property, estate or assets to authorize the grant of administration in the state of injury, if the deceased was a resident of that state.[1] When the deceased was a non-resident of that state, there is some conflict of opinion; but the better rule seems to be that even in such case the claim for damages will authorize the grant of administration in the state of injury, at least after administration has been obtained at the domicil of the deceased.

In Hartford &c. R. Co. v. Andrews (Conn.)[2] it was held that an administrator appointed at the domicil of the deceased (Maine) was entitled as a matter of right to be appointed ancillary administrator in Connecticut for the purpose of prosecuting a suit for damages for his negligent killing in Connecticut, and that such claim for damages was sufficient to authorize his appointment. The court says that the claim, if valid, is property within the meaning of the statute. "It was not the province of the court of probate to pass upon the validity of the claim; it was enough for that court to be satisfied that there was an apparent claim, and a bona-fide intention to pursue it, and that administration was necessary to its pursuit."[3]

[1] Sargent v. Sargent, 168 Mass. 420; 47 N. E. 121 (1897).
[2] 36 Conn. 213.
[3] Per Butler, J., for the court, p. 215.

A contrary decision, however, has been made in the Kansas case of Perry v. St. Joseph &c. R. Co. (Kan.).[1] In that case a non-resident of Kansas was killed in that state through the negligence of the defendant railroad company. Section 422 of the Kansas code gave a right of action to the personal representative of the deceased for the benefit of the widow and children, if any, or the next of kin. The plaintiff was appointed administrator in Kansas, upon the ground that this claim for damages was "estate" of the deceased within the state of Kansas. In this action for damages it was held (1) that the claim for damages was not "estate" within the meaning of the statute authorizing the grant of administration upon the estate of a non-resident; (2) that the probate court was therefore without jurisdiction;[2] (3) that its decree was void, and could be impeached collaterally in this action, and that the plaintiff could not recover.

The Indiana statute gave a right of action to the personal representative of a person killed by the wrongful act or omission of another, and declared that the damages "must inure to the exclusive benefit of the widow and children, if any, or next of kin" of the deceased. One Swayne, a citizen of Pennsylvania, was killed in a railroad accident in Indiana, and his administrator appointed in Indiana brought an action against the railroad. The railroad company then petitioned the probate court to revoke the letters of administration. Swayne left no assets in Indiana, unless this claim for damages was such. On appeal from the probate decree, it was held that the claim for damages was not assets for founding administration on the estate of a non-resident; that the probate court had no jurisdiction, and that the letters should therefore be

[1] 29 Kan. 420.

[2] See also, Mallory v. Burlington &c. R. Co., 53 Kan. 557; 36 Pac. 1059.

revoked.[1] In the opinion of the court, delivered by Mr. Justice Elliott, it is said on pages 484, 485: "The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby by the widow and children or next of kin of the deceased, for the damages must inure to their exclusive benefit. They are recovered in the name of the personal representative of the deceased, but do not become assets of the estate. The relation of the administrator to the fund, when recovered, is not that of the representative of the deceased, but of a trustee for the benefit of the widow and next of kin. The action is for their exclusive benefit, and if no such person existed it could not be maintained."

§ 141. Same.—When the person killed was neither injured nor domiciled in the state granting the letters of administration, the authorities are also conflicting. In Iowa it has been held that a claim for damages under the Illinois act for the negligent killing in Illinois of a resident of Illinois would authorize a probate court of Iowa to grant letters of administration, on the ground that an action for such death could be maintained in Iowa.[2] It was accordingly held that the Iowa administrator could maintain an action in Iowa against the employer of the deceased, the railroad company, for such killing in Illinois, as the Illinois statute gave a right of action for such death, and it was not contrary to the public policy of Iowa. Upon the main proposition the court, by Mr. Justice Rothrock, says, on page 728: "The argument [of defendant] is based upon the claim that the deceased left no estate within this state to be administered upon; that whatever claim existed against the defend-

[1] Jeffersonville R. Co. v. Swayne, 26 Ind. 477.
[2] Morris v. Chicago &c. R. Co., 65 Iowa 727; 23 N. W. 143.

ant for damages for the death of Quigley arose under the law of Illinois, where the injury was received, and where the death occurred; and that by the law of that state a right of action was not in the estate, but in the wife, husband, or next of kin, if there were any surviving. If it be correct, as claimed by appellant, that no right of action existed in this state, it is probably true that there was no estate upon which to administer. But if an action may be maintained in this state by an administrator, we think it necessarily follows that the circuit court had jurisdiction to make the appointment, and it is immaterial in such case whether the decedent was a resident of the state of Illinois or of this state. The power to appoint an administrator in this state, for the sole purpose of collecting a claim due to the decedent, has been too long authorized and recognized to be now questioned."

In New York, under its statutes relating to the probate or surrogate's court, letters of administration granted by the surrogate are deemed conclusive evidence that the deceased left assets within the county, and the administrator's right to sue can not be defeated by proof that the deceased was injured in another state (Connecticut) and left no assets in New York.[1] The reasoning of the New York

[1] Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; 38 Am. R. 491. There are some limits, however, to the doctrine of the conclusiveness of the appointment of an administrator. A fundamental want of jurisdiction may be shown in a collateral proceeding. Thus a state statute authorizing administration upon the estate of a person who has been absent and unheard of for seven years is contrary to due process of law and void as applied to a living person; and the decree of appointment is also void, and may be impeached by him in a collateral proceeding to recover property conveyed by the administrator to a bona-fide purchaser for value. This is a question of federal law, and the United States supreme court has jurisdiction to review and to reverse a state judgment to the contrary: Scott v. McNeal, 154 U. S. 34; 14 S. Ct. 1108; reversing s. c. 5 Wash. 309; 31 Pac. 873; 34 Am. St. 863; and virtually overruling Roderigas v. East River Sav. Inst., 63 N Y. 460; 20 Am. R. 555. See also, Lavin v. Emigrant Industrial Sav. Bank, 18 Blatch. 1.

court in the case cited is broad enough to apply to the case of a non-resident of New York, and the principal case cited by the court[1] was that of a non-resident.

The supreme court of Illinois has decided the contrary, as applied to an Illinois corporation, where the negligent act was committed by such corporation. In Illinois Cent. R. Co. v. Cragin (Ill.)[2] a resident of Illinois was killed in Illinois by the negligence of an Illinois corporation, for which the Illinois statute gave a right of action. The deceased left no property in Iowa, unless this claim for damages could be considered as situated in Iowa. The plaintiff, Cragin, however, obtained letters of administration in Iowa, and brought this suit thereon in Illinois against the railroad company. It was held that the action could not be maintained, chiefly on the ground that, as the defendant was a corporation of Illinois, no cause of action existed against it in Iowa. The court conceded that the case might be different as applied to individuals.

§ 142. Who may sue when employee dies before action is brought.—The Alabama Employers' Liability Act provides that the "personal representative" of the deceased employee may maintain an action against the employer. Under this statute it has been held that the executor or administrator of the deceased employee is the only proper person to bring suit,[3] but that if the deceased was a minor child he could not recover for the time of the minority of the deceased if his father or mother was alive and was entitled to receive his wages.[4]

[1] Roderigas v. East Riv. Sav. Inst., 63 N. Y. 460; 20 Am. R. 555.

[2] 71 Ill. 177.

[3] Columbus &c. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90; Lovell v. De Bardelaben Coal Co., 90 Ala. 13; 7 So. 756; Tennessee Coal Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[4] Williams v. South &c. R. Co., 91 Ala. 635; 9 So. 77; Alabama &c. Coal Co. v. Pitts, 98 Ala. 285; 13 So. 135.

The Alabama statute, as originally enacted in 1885,[1] provided that the "heirs at law" of the deceased employee should have the same right of compensation and remedies against the employer as if the workman had not been in his service nor engaged in his work. In Stewart v. Louisville &c. R. Co. (Ala.)[2] it was also held under this act that the personal representative was the only person who could maintain an action, and that an action brought by two brothers of the deceased, who were his next of kin, could not be maintained.

In statutes of a like nature, the words "personal representative" have also been held to mean the executor or administrator of the person killed by a negligent act.[3] When the statute provides that the action may or shall be brought in the name of the personal representative, no one else can maintain an action, not even the widow, or other person entitled to receive the damages.[4]

Under the Alabama Employers' Liability Act, a father can not sue for an injury to his minor son resulting in death: the personal representative is the only person who can sue. The father has no standing in court to recover damages against the employer under that statute.[5] In delivering the opinion of the court in the first case just cited, Mr. Justice McClellan says, on page 18: "In creating this new cause of action, it was, therefore, not only entirely competent for the legislature to confine it, in cases where the injury produced death, to the personal representative, but, in doing so, no existing right to sue was

[1] Ala. Sess. Acts 1884–1885, p. 115.

[2] 83 Ala. 493; 4 So. 373.

[3] McCarty v. New York &c. R. Co., 62 Fed. 437; Perry v. St. Joseph &c. R. Co., 29 Kan. 420.

[4] Selma &c. R. Co. v. Lacy, 49 Ga. 106; Monaghan v. Horn, 7 Canada Sup. Ct. 409; Stewart v. Louisville &c. R. Co., 83 Ala. 493; 4 So. 373.

[5] Lovell v. De Bardelaben Coal Co., 90 Ala. 13; 7 So. 756; Woodward Iron Co. v. Cook, 124 Ala. 349; 27 So. 455 (1900).

taken away from the parents. If the minor's employment was against the will of the father, he could maintain an action before the 'Employers' Act,' and afterwards, though not under it. If with his consent, as in this case, he could sue neither before or after, nor under or without the statute, if we are to give any force whatever to section 2591,[1] which designates the only person who may sue under the act, where the injury results in death, and particularly and peremptorily makes provision for the disposition of the recovery, which can only be carried out by the personal representative."

The minority of an administrator can not be shown in a collateral action. In Davis v. Miller (Ala.)[2] it was decided that the appointment of an administrator by the probate court can not be impeached in an action under the Employers' Liability Act on the ground that the person was not entitled to administer because of his minority. So long as the plaintiff remains administrator of the estate of the deceased, he is entitled to bring the suit, whether he is twenty-one years of age or under that age.

§ 143. Same.—The Massachusetts act declares that in certain cases the "legal representatives," and in other cases the widow of the deceased, or, if no widow, the dependent next of kin, may maintain an action under the statute against the employer. This question is explained in the preceding sections of this chapter. The term "legal representative" means the executor or administrator of the deceased employee.

In England it has been decided under Lord Campbell's Act that a husband, who has lived apart from his wife for years, can not recover under that statute, on the ground that by such conduct he loses his right to claim the ben-

[1] Ala. code 1886 (code 1896, § 1749).
[2] 109 Ala. 589; 19 So. 699 (1896).

efit of the act.[1] Nor can a wife who is living in adultery apart from her husband recover under this statute.[2]

In the United States, however, it has been held that the fact that husband and wife separated by mutual consent, and each married another person before the husband was killed by the wrongful act of the defendant, does not prevent the wife from maintaining an action for such death, under a statute like Lord Campbell's Act.[3]

In Savannah &c. R. v. Smith (Ga.)[4] it was held that the mother of a minor child, who has been abandoned by her husband, and has supported the child, may maintain an action for the killing of the child, by wrongful act, notwithstanding the father is alive.

Under Burns' revised statutes of Indiana of 1901, section 267, providing that a father may maintain an action for the death of a child by the defendant's wrongful act or negligence, a man who marries the mother of a bastard child, and takes him into his home as a member of the family, can not sue for the child's death.[5]

The term "child" in Burns' Rev. St. Ind. 1901, § 267, refers merely to a legitimate child, and therefore the father of a bastard can not maintain such an action.[6]

In Citizens' St. R. Co. v. Cooper (Ind.)[7] a woman who was not the mother but who had received the child in its infancy and brought it up as her own, commenced this

[1] Harrison v. London &c. R. Co., 1 Times Law Rep. 519.

[2] Stimpson v. Wood, 57 L. J. Q. B. 484.

[3] Thomas v. East Tennessee &c. R. Co., 63 Fed. 420.

[4] 93 Ga. 742; 21 S. E. 157.

[5] Thornburg v. American Strawboard Co., 141 Ind. 443; 40 N. E. 1062; 50 Am. St. 334.

[6] McDonald v. Pittsburgh &c. R. Co., 144 Ind. 459; 43 N. E. 447; 55 Am. St. 185; 32 L. R. A. 309 (1896); citing Dickinson v. North Eastern R. Co., 2 H. & C. 735; Marshall v. Wabash R. Co., 120 Mo. 275; 25 S. W. 179; Harkins v. Philadelphia &c. R. Co., 15 Phila. (Pa.) 286; 39 Leg. Int. (Pa.) 4.

[7] 22 Ind. App. 459; 53 N. E. 1092.

action to recover damages under the Indiana act for the wrongful killing of the child. It was held that as the statute was in derogation of the common law, it must be strictly construed, and that as the plaintiff had not legally adopted the child, she was not entitled to the benefit of the act and could not recover.[1]

In Wabash R. Co. v. Cregan (Ind.)[2] it was held that a brother of one killed is not entitled to the benefit of the Indiana act for death by wrongful act, because there was no legal obligation to support him.

In Hindry v. Holt (Colo.)[3] it was ruled that a niece is not entitled to the benefit of the Colorado act for death by wrongful act, although she is the heir of the deceased, because the words "heir or heirs" as used in this statute mean "child or children." The purpose of the act is to compensate those who suffer pecuniary loss by reason of the death, and the words used must be given this restricted meaning.

A child en ventre sa mère may recover under such statutes.[4]

A bastard can not recover under Lord Campbell's Act.[5]

But a child who is prematurely born by reason of a highway accident to its mother and who lives only a few minutes, is not a "person" for whose death an action can be maintained for a defect in the highway against the town.

[1] See also, Citizens' St. R. Co. v. Willoeby, 15 Ind. App. 312; 43 N. E. 1058; Marshall v. Wabash R. Co., 120 Mo. 275; 25 S. W. 179.

[2] 23 Ind. App. 1; 54 N. E. 767 (1899).

[3] 24 Colo. 464; 51 Pac. 1002; 65 Am. St. 235; 39 L. R. A. 351 (1897).

[4] The George and Richard, 24 L. T. (N. S.) 717; Nelson v. Galveston &c. R. Co., 78 Tex. 621; 14 S. W. 1021; 22 Am. St. 81.

[5] Dickinson v. North Eastern R. Co., 2 H. & C. 735.

[6] Dietrich v. Inhabitants &c., 138 Mass. 14 (1884). Compare Allaire v. St. Luke's Hospital, 184 Ill. 359; 56 N. E. 638 (1898); Gorman v. Budlong, 23 R. I. —; 49 Atl. 704 (1901).

§ 144. Former judgment as a bar to action.—If the defendant be made liable by statute for the negligent killing of the plaintiff's decedent, as well as for his conscious suffering during life, a judgment in an action for conscious suffering is no bar to an action for his death. There are two separate causes of action, and even if the local practice allows them to be joined in one declaration in the same action, the former judgment is no bar.[1]

Where the Employers' Liability Act gives the right of action to the "personal representative" of the deceased employee, as in Alabama, it has been decided that a suit by any one else is no bar to another suit on the same cause of action by the executor or administrator of the deceased.[2] A like principle applies also to a former suit brought by any person other than the person specified in the statute, or to a former judgment rendered in a suit brought by such person. But if the injured person himself recovers a judgment and dies, or accepts money in satisfaction and discharge of his injury, this bars an action by his personal representative under the statutes of some states.[3]

If the same tort causes damage to the person and to the property of the same individual, a judgment for one cause of action will bar an action for the other in Massachusetts, Minnesota and Missouri, but not in New York or in England.[4]

[1] Clare v. New York &c. R. Co., 172 Mass. 211; 51 N. E. 1083.

[2] Tennessee Coal Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[3] Littlewood v. Mayor &c., 89 N. Y. 24; 42 Am. R. 271 (1882); Hecht v. Ohio &c. R. Co., 132 Ind. 507; 32 N. E. 302 (1892); Read v. Great Eastern &c. R. Co., L. R. 3 Q. B. 555 (1868).

[4] Bliss v. New York &c. R. Co., 160 Mass. 447, 455; 36 N. E. 65 (1894); Trask v. Hartford &c R. Co., 2 Allen (Mass.) 331 (1861); Doran v. Cohen, 147 Mass. 342; 17 N. E. 647 (1888); King v. Chicago &c. R. Co., 80 Minn. 83; 82 N. W. 1113 (1900); Von Fragstein v. Windler, 2 Mo. App. 598 (1876); Brunsden v. Humphrey, 14 Q. B. D. 141; Macdougall v. Knight, 25 Q. B. D. 1, 8.

§ 145. Domestic administrator's right to sue for injury received in another state.—In the federal courts the rule is now settled that an administrator appointed in the state of domicil may sue in that state under a statute of another state in which the injury was received. The fact that the deceased had no right of action for the injury himself, or that the statute creating the right gave it to the personal representative for the benefit of the widow and next of kin, does not defeat his right of recovery.[1] This is a question of general law or jurisprudence upon which the federal courts are not bound by the law or practice of the courts of the state in which they sit.[2]

In New York it has been held that an administrator appointed in New York may sue therein for an injury received in Connecticut without showing that administration had been taken out in Connecticut.[3]

In Massachusetts a distinction has been drawn between actions which survive and those which do not survive. When the statute of the state of injury gives a right of action to the injured person, and provides that it shall survive to his personal representative for the benefit of his widow, etc., it has been held that an administrator appointed in Massachusetts, the place of domicil, may maintain an action there for an injury received in Connecticut.[4] But when the statute of the state of injury failed to provide for the survival of the action, it was held that a Massachusetts administrator could not maintain an action in that state.[5] This decision was placed upon the ground that the right of a Massachusetts administrator to

[1] Dennick v. Railroad Co., 103 U. S. 11.

[2] Dennick v. Railroad Co., supra.

[3] Leonard v. Columbia Nav. Co., 84 N. Y. 48; 38 Am. R. 491.

[4] Higgins v. Central New England R. Co., 155 Mass. 176; 29 N. E. 534; 31 Am. St. 544.

[5] Richardson v. New York Cent. R. Co., 98 Mass. 85; Davis v. New York &c. R. Co., 143 Mass. 301; 9 N. E. 815.

sue in that state was confined to causes of action which accrued to the intestate during his lifetime, or which grew out of his rights of property or those of his creditors; and that a specific power to sue created by the statute of another state could not be imparted to a Massachusetts administrator, so as to give him the right to sue in Massachusetts.

In Ohio and in Kansas it has also been decided that a domestic administrator, appointed at the domicil of the deceased, could not sue under a statute of another state in which the injury was received.[1]

It has also been held in Massachusetts and in Kansas that the fact that the statute of the state of process provides that the right of action shall survive to the personal representative does not enable the domestic administrator to sue for an injury received in another state.[2]

§ 146. Foreign administrator's right to sue.—The general rule is well settled, both in the state and federal courts, that in the absence of an enabling statute an executor or administrator appointed in one state can not sue in another state in his representative capacity. Unless the laws of the state of process allow a foreign administrator to prosecute a suit therein, he must take out ancillary administration before he can do so.[3]

Many states, however, have passed such enabling statutes. Thus, in Indiana, the statute provides that a foreign administrator may sue "in like manner and under like restrictions as a resident administrator;" and it has been

[1] Woodard v. Michigan Southern R. Co., 10 Ohio St. 121; McCarthy v. Chicago &c. R. Co., 18 Kan. 46; 26 Am. R. 742.

[2] Davis v. New York &c. R. Co., 143 Mass. 301; 9 N. E. 815; McCarthy v. Chicago &c. R. Co., 18 Kan. 46; 26 Am. R. 742.

[3] Noonan v. Bradley, 9 Wall. 394; Lawrence v. Nelson, 143 U. S. 215; 12 S. Ct. 440; Langdon v. Potter, 11 Mass. 313; Chapman v. Fish, 6 Hill (N. Y.) 554; Bell v. Nichols, 38 Ala. 678; Gilman v. Gilman, 54 Me. 453.

held that an administrator appointed in another state may sue in Indiana for an injury there received resulting in death, under the Indiana statutes giving a right of action therefor.[1] So, under the Georgia enabling act it has been decided that an executor or administrator appointed in South Carolina may sue in Georgia, upon complying with certain conditions prescribed by the code, for a death caused by negligence in South Carolina.[2]

The claim for a tort not reduced to judgment is not a "debt" within the meaning of a statute authorizing foreign administrators to sue for the recovery of "debts due to their decedents."[3]

Where the statute of a state in which an injury resulting in death is received gives a right of action to the personal representative of the deceased for the exclusive benefit of the widow and next of kin, an administrator appointed in that state may sue in another state without taking out ancillary letters; because the amount recoverable is no part of the assets of the estate, but belongs to the widow and next of kin.[4] The relation of the administrator to the damages, when recovered, is not that of the representative of the deceased, but that of an agent or trustee for the benefit of the widow and next of kin.[5]

In Kansas Pac. R. Co. v. Cutter (Kan.)[6] a similar decision was placed partly on the ground that the term "personal representative" included a foreign administrator, and partly on the ground that the damages recovered

[1] Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48.

[2] South Carolina R. Co. v. Nix, 68 Ga. 572.

[3] Maysville St. R. Co. v. Marvin, 59 Fed. 91; 8 C. C. A. 21; reversing s. c. sub nom. Marvin v. Maysville St. R. Co., 49 Fed. 436.

[4] McCarty v. New York &c. R. Co., 62 Fed. 437.

[5] Jeffersonville &c. R. Co. v. Swayne, 26 Ind. 477, 484, 485; Perry v. St. Joseph &c. R. Co., 29 Kan. 420, 422, 423; Wooden v. Western New York &c. R. Co., 126 N. Y. 10, 15; 26 N. E. 1050; 22 Am. St. 803; 13 L. R. A. 458.

[6] 16 Kan. 568.

were not assets of the estate for the payment of debts, but belonged exclusively to the widow and children, if any, or next of kin.[1]

In Limekiller v. Hannibal &c. R. Co. (Kan.)[2] a resident of Missouri was killed in Kansas. The plaintiff was appointed administratrix in Missouri, and brought this action under section 422 of the Kansas civil code, which gave a right of action to the personal representative of a person killed by the wrongful act or omission of another —the damages to inure to the exclusive benefit of the widow and children, if any, or next of kin. In Missouri the personal representative had no power to institute such an action, but the husband or wife of the deceased had such power. It was held that the plaintiff could not maintain the action, for the reason that her powers or rights in Kansas could be no greater than they were in Missouri, the place of her appointment.

Where the statute creating the cause of action for death gives the right of action to the personal representative of the deceased as assets of the estate and not as a fund for the benefit of the widow or next of kin, a foreign administrator can not sue, but only a domestic administrator who is directly responsible to domestic creditors, and this is true although another statute of the forum empowers foreign administrators to sue for the recovery of debts due to their decedents.[3]

§ 147. Same—Author's view.—The true view seems to be to regard an administrator, appointed in a state having such a statute, as a statutory trustee for the benefit of the widow or next of kin, and entitled to sue as such in another state without ancillary administration therein. He does not sue for the benefit of the estate, but for the bene-

[1] See also, Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48, 72.
[2] 33 Kan. 83; 5 Pac. 401; 52 Am. R. 523.
[3] Maysville St. R. Co. v. Marvin, 59 Fed. 91; 8 C. C. A. 21.

fit of the widow or next of kin. The same statute which creates the right of action designates the personal representative of the deceased as the proper person to bring the suit. The fact that he describes himself as executor or administrator of the deceased does not change the essential nature of the action; it is still an action for the benefit of the widow or next of kin, and he is merely the agent or trustee appointed to prosecute it, and to pay over the proceeds, if any, not to the creditors or legatees of the deceased, but to the widow or next of kin. His right or title to the proceeds is not derived from the deceased, but from the statute.

The case seems to be analogous to that of a person appointed, under a statute of the state creating a corporation, to hold the property of the corporation, after its dissolution, for the benefit of its creditors and stockholders and others interested in the assets. It has been held that such a statutory trustee or receiver may sue and be sued in the courts of another state without an appointment from the latter state, on the ground that a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give, and that such person is the legal representative of the corporation, and therefore entitled to recognition as such in other states, or in the federal courts sitting in other states.[1]

This view receives support from the cases holding that a foreign administrator may sue when his suit is not brought in his representative capacity, but in his personal or some other capacity, as payee of a note given in payment of property belonging to the estate,[2] or when he

[1] Relfe v. Rundle, 103 U. S. 222; Parsons v. Charter Oak Ins. Co., 31 Fed. 305; Bockover v. Life Ass'n, 77 Va. 85. See also, § 259, post.

[2] McCord v. Thompson, 92 Ind. 565.

has reduced a debt due to the estate to judgment in the state of appointment.[1]

§ 148. Who are "dependent" upon the employee.—In Daly v. New Jersey Steel Co. (Mass.)[2] it was held that an invalid sister of the employee, who was unable to work regularly or to earn sufficient to pay her doctor's bills, and who received from her brother thirty to thirty-five dollars a month on an average for three or four years, was dependent upon him for support within the meaning of the statute. This decision was placed upon the ground that it was not necessary that the person claiming as a dependent should be dependent in the sense that the employee was legally bound, if able, to support the claimant.[3] The fact of dependence was held to be sufficient to bring the claimant within the benefit of the statute.[4]

Partial dependence for the necessaries of life is sufficient to render the person "dependent" within the meaning of the Employers' Liability Act.[5] Thus, in Welch v. New York &c. R. Co. (Mass.),[6] there was evidence that for a long time before his death the plaintiff's son had given her all his wages, and that she needed the money to obtain the necessaries of life, beyond that which her husband could furnish. It was held that

[1] Talmage v. Chapel, 16 Mass. 71; Biddle v. Wilkins, 1 Peters 686; Barton v. Higgins, 41 Md. 539; Lewis v. Adams, 70 Cal. 403; 11 Pac. 833; 59 Am. R. 423; Cherry v. Speight, 28 Tex. 503. For other illustrations, see Doe v. McFarland, 9 Cranch 151; De Forest v. Thompson, 40 Fed. 375.

[2] 155 Mass. 1; 29 N. E. 507.

[3] Mass. Pub. Stats., ch. 84, § 6.

[4] See also, Houlihan v. Connecticut River R. Co., 164 Mass. 555; 42 N. E. 108.

[5] Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 386; Simmons v. White, (1899) 1 Q. B. 1005; Atlanta &c. R. Co. v. Gravitt, 93 Ga. 369, 372; 20 S. E. 550; 44 Am. St. 145; 26 L. R. A. 553.

[6] 176 Mass. 393; 57 N. E. 668 (1900); s. c. on second appeal, 182 Mass. —; 64 N. E. 695 (1902).

the jury would be warranted in finding that the mother was dependent upon her son for support within the meaning of the statute.

Under statutes giving a right of action for the benefit of the widow and next of kin of the deceased, the damages to be awarded "with reference to the pecuniary injuries resulting from such death to the widow and next of kin," it has also been held that a recovery may be had without proof that the beneficiary had a legal claim upon the deceased for support. To hold the contrary "would be an interpolation in the statute changing the fair import of its terms, and hence not warranted."[1]

In Hodnett v. Boston &c. R. Co. (Mass.)[2] the claimant was the employee's half-sister. Her testimony was that he used to come in and see her, and sometimes gave her money; that he sent her money every other week or so to pay her rent; and that she had no means of support for herself and her two children but her earnings, and since his death she had had to support herself. There was no evidence to show what her earnings or living expenses were. It was held that such evidence would not warrant a jury in finding that the claimant was dependent upon the wages of the employee for support, and that she could not recover under the act.[3] But in this case there was nothing to prove that the plaintiff did not support herself by her own earnings.[4]

§ 149. Action by dependent in Massachusetts.—Where the employee's death is instantaneous, the action should

[1] Railroad Co. v. Barron, 5 Wall. 90, 106; City of Chicago v. Major, 18 Ill. 349; 68 Am. D. 553; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526.

[2] 156 Mass. 86; 30 N. E. 224.

[3] As to who are or are not "dependent," see further, McCarthy v. Supreme Lodge &c., 153 Mass. 314; 26 N. E. 866; 25 Am. St. 635; 11 L. R. A. 144; Supreme Council &c. v. Perry, 140 Mass. 580; 5 N. E. 634.

[4] Mulhall v. Fallon, 176 Mass. 266, 267; 57 N. E. 386, per Holmes, J.

be brought in the name of the next of kin who is dependent upon the wages of such employee for support. If there are two next of kin, and only one of them is dependent, the action should be brought in his or her name alone, without joining the other.[1]

§ 150. Following death-money as trust funds.—By express provision in Alabama, and by necessary implication in other states, the damages recovered under the Employers' Liability Acts for injuries resulting in death are not assets of the estate of the deceased or subject to the payment of debts, but belong beneficially to the widow, children, or next of kin dependent. The fact that the legal representative is the only person entitled to sue for such damages, and that the legal title vests in him, constitutes him in effect a trustee for the beneficiary, and if he fails to pay over the proceeds and invests them in land, the beneficiary has a remedy in equity, and may establish a trust in the land.[2]

[1] Daly v. New Jersey Steel Co., 155 Mass. 1; 29 N. E. 507.
[2] Griswold v. Griswold, 111 Ala. 572; 20 So. 437 (1896).

CHAPTER IX.

CONTRIBUTORY NEGLIGENCE.

Section		Section	
151.	Contributory negligence is a defense.	155.	Employee's right to rely upon warning from person.
152.	Exposure to sudden and imminent danger.	156.	Same.
153.	Defendant's responsible employees must use reasonable care to avoid injury to the plaintiff when they know he is in a dangerous position.	157.	Warning from object.
		158.	Inference of due care.
		159.	Selecting dangerous mode of performing work when safe way exists.
154.	Wilful, wanton, or intentional negligence.	160.	Same.
		161.	Other illustrations of due care and contributory negligence.

§ 151. Contributory negligence is a defense.—It is well settled in the United States, and also in England, that the various Employers' Liability Acts have not abolished the defense of contributory negligence. If the injured employee is guilty of such negligence, he can not recover under the act.[1] The Massachusetts, New York, Indiana and Colorado statutes confer the right of action in terms only upon an employee "who is himself in the exercise of due care and diligence at the time," while the English and Alabama statutes are silent upon the subject.

In Wilson v. Louisville &c. R. Co. (Ala.)[2] a freight-

[1] Geyette v. Fitchburg R. Co., 162 Mass. 549; 39 N. E. 188; Brown v. New York &c. R. Co., 158 Mass. 247; 33 N. E. 650; Tirrell v. New York &c. R. Co., 180 Mass. 490; 62 N. E. 745 (1902); Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146; Columbus &c. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90; Richmond &c. R. Co. v. Thomason, 99 Ala. 471; 12 So. 273; Weblin v. Ballard, 17 Q. B. D. 122; Perigo v. Indianapolis Brewing Co., 21 Ind. App. 338; 52 N. E. 462.

[2] 85 Ala. 269; 4 So. 701.

brakeman, while descending from the top of the caboose by a side-ladder, was struck by the supply-pipe of a water-tank near the track and injured. The tank was so near the track as not to leave sufficient space between the pipe and a train of cars for the body of a person. The plaintiff had been in the employ of the defendant road for two or three months, and was acquainted with the location and the surroundings of the tank. The accident occurred at 3 o'clock in the morning, and the plaintiff did not have his lantern with him. He was not descending to discharge a duty required by the nature of his employment, but merely for the purpose of eating his lunch. In an action under the Alabama statute, it was held that the plaintiff was guilty of contributory negligence and could not recover.

In Columbus &c. R. Co. v. Bridges (Ala.)[1] an engineer of a construction train, who was also acting as conductor, was killed by the falling of a bridge while attempting to take his train across a river during a great flood. The evidence tended to show that the watchman at the bridge gave the safety signal, and the plaintiff contended that the defendant was liable for his act as being a person in "charge or control of any signal, points, * * * or of any part of the track of a railway." It appeared that in the morning of the same day, while the water was rapidly rising, the deceased had himself examined the bridge, and that in crossing the bridge he was not acting under the orders of any superior officer. It was held that the deceased was guilty of contributory negligence, and that the defendant was not liable under the act.

In New York, however, section 3 of the Employers' Liability Act of 1902, ch. 600, has engrafted an important qualification upon the defense of contributory negligence by converting a question of law for the court into a

[1] 86 Ala. 448; 5 So. 864; 11 Am. St. 558.

question of fact for the jury in certain classes of cases. When the presiding justice thinks that the employee's continuance in the same place and course of employment with knowledge of the risk of injury shows contributory negligence on his part as matter of law, he can not, since the passage of this statute, order a nonsuit or a verdict for the defendant, but must let the case go to the jury as a question of fact on this issue, "subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence."

§ 152. Exposure to sudden and imminent danger.—An employee who is injured by the negligence of any one for whose negligence the employer is liable under the Employers' Liability Act, through an exposure to a sudden and imminent danger caused by the negligent act of such person, is not required to act with the same coolness and judgment as if the danger were not sudden and unexpected. He will not be guilty of contributory negligence if he exercise the prudence of an ordinary or reasonable person under like circumstances.[1]

In Richmond &c. R. Co. v. Farmer, just cited, a section-foreman in the employ of the defendant railroad was injured by a locomotive-engine while he was engaged in repairing a broken frog on a trestle. The trestle was about sixty feet long and from four to six feet high. Two engines were standing at opposite ends of the trestle, ready to cross as soon as the frog was repaired. The plaintiff notified one of the engineers to cross over slowly, so that he could watch the frog and switch and see how it worked, and he told the other engineer not to cross until he signaled to him. While the plaintiff was stooping down watching the frog, very shortly after the first engine had

[1] Richmond &c. R. Co. v. Farmer, 97 Ala. 141; 12 So. 86; Woodward Iron Co. v. Andrews, 114 Ala. 243; 21 So. 440 (1897).

passed and before he had signaled for the second engine, the latter started to cross, and the plaintiff knew nothing of its approach until it was close upon him, when some one hallooed to him. In an action under the Employers' Liability Act for the negligence of the engineer in charge of the second engine, it was held that a charge in the following language was correct: "A man under sudden excitement or peril is only required to exercise such care for his own safety as an ordinary, prudent man would have exercised under like circumstances, and if he exercised such degree of care, then in that he is not guilty of contributory negligence."

In Louisville &c. R. Co. v. Thornton (Ala.)[1] it was ruled that an employee who is suddenly placed in a position of great peril will be presumed, in the absence of any evidence throwing light upon the matter, to have observed that care and caution which the law requires, as instinct would prompt him to use diligence in saving his life.[2]

§ 153. Defendant's responsible employees must use reasonable care to avoid injury to the plaintiff when they know he is in a dangerous position.—In Alabama the common-law rule of some jurisdictions, that contributory negligence of the plaintiff will not prevent a recovery if the defendant, knowing the plaintiff's dangerous position and negligence, fails to use reasonable care to avoid the injury,[3] has also been applied to actions under the Em-

[1] 117 Ala. 274; 23 So. 778 (1898).

[2] Citing Cook v. Central R. &c. Co., 67 Ala. 533; Pennsylvania R. Co. v. Weber, 76 Pa. St. 157; 18 Am. R. 407; Wharton Neg., § 304.

[3] Inland Coasting Co. v. Tolson, 139 U. S. 551; 11 S. Ct. 653; Lucas v. New Bedford &c. R. Co., 6 Gray (Mass.) 64, 72; 66 Am. D. 406; Radley v. Directors &c., 1 App. Cas. 754; Tanner v. Louisville &c. R. Co., 60 Ala. 621; Cook v. Central R. Co., 67 Ala. 533; Louisville &c. R. Co. v. Watson, 90 Ala. 68; 8 So. 249; Romick v. Chicago &c. R. Co., 62 Iowa 167; 17 N. W. 458; 15 Am. & Eng. R. Cas. 288; Denver Rapid

ployers' Liability Act. Of course this rule does not render the common employer liable for the negligence of an ordinary coemployee,[1] but merely for that of a responsible employee, such as a superintendent, or, in the case of a railroad, a person having the charge or control.

In Hissong v. Richmond &c. R. Co. (Ala.)[2] a switchman was injured while attempting to couple two railroad-cars. The plaintiff testified that he first attempted to couple the cars with a stick, as required by the rules of the company, but could not do so because the draw-heads of the cars were not of the same height; that he then signaled the engineer to stop the train, and when it had stopped he went in between the cars to make the coupling by hand; that when he had been working on the pin thirty or forty seconds, and before he had made the coupling, the engineer moved the car backwards upon him and thereby caused his injuries. It was held, in an action under the Employers' Liability Act for the negligence of the engineer, as being a person in the charge or control of an engine, car or train upon a railroad, that, although the plaintiff was guilty of negligence, the plaintiff was entitled to recover, because the engineer, with knowledge of the plaintiff's perilous position and negligence, failed to use ordinary care to avoid the injury.[3]

The reasons for this rule were stated by Chief Justice McClellan in Louisville &c. R. Co. v. Brown (Ala.)[4] thus:

Transit Co. v. Dwyer, 20 Colo. 132; 36 Pac. 1106; Kansas Pac. R. Co. v. Cranmer, 4 Colo. 524; Austin v. New Jersey Steamboat Co., 43 N. Y. 75, 82.

[1] Central of Georgia R. Co. v. Lamb, 124 Ala. 172; 26 So. 969 (1900).

[2] 91 Ala. 514; 8 So. 776.

[3] See also, Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870; Alabama &c. R. Co. v. Richie, 99 Ala. 346; 12 So. 612; Louisville &c. R. Co. v. Watson, 90 Ala. 68; 8 So. 249; Louisville &c. R. Co. v. Hurt, 101 Ala. 34; 13 So. 130; Alabama &c. R. Co. v. Burgess, 116 Ala. 509; 22 So. 913 (1898).

[4] 121 Ala. 221, 227; 25 So. 609.

"In such case the original negligence of the injured party, whereby he is placed in a perilous position, does not in a legal sense contribute to the result; it is a remote, not a proximate cause; it is a condition, indeed, rather than a cause, remote or proximate; and the law ascribes the disaster solely to a want of due care on the part of the person controlling the agency of the injury, but for whose negligence no hurt would have been done, notwithstanding the injured party's original fault."

In Louisville &c. R. Co. v. Markee (Ala.)[1] a section-foreman riding on a hand-car was killed by a collision with a train moving in the same direction at its usual rate of speed. The hand-car had just emerged from a cut in the rocks where the locomotive-engineer could not see the hand-car until within one hundred and fifty yards of it, on account of a curve in the track. As soon as the engineer saw the hand-car he put on the brakes and reversed the engine, and he testified that in his opinion this was the most effective way to stop a train. The conductor, however, testified that in his opinion the best way was to reverse the engine first and then apply the brakes. In an action under the Employers' Liability Act, where the deceased had been guilty of contributory negligence in failing to flag the curve in the track, it was held that whether the conductor or the engineer was correct in his view, if the engineer adopted the means which he believed best adapted for stopping the train, and in good faith did all he could to prevent the collision, he was not guilty of such wanton or reckless negligence as to purge the contributory negligence of the deceased, and that the defendant was not liable.[2]

The fact that a railroad company maintains an overhead bridge which is only five feet and two inches above

[1] 103 Ala. 160; 15 So. 511.

[2] See also, Chambliss v. Mary Lee Coal Co., 104 Ala. 655; 16 So. 572.

the tops of freight-cars, although it could be raised at small expense, does not constitute wilful or wanton negligence on its part which will render it liable under the statute to a brakeman who has been injured while guilty of contributory negligence.[1]

In Massachusetts, a person in the employ of a third person upon the defendant's premises, as well as other classes of plaintiffs, is entitled to the benefit of this rule in actions at common law,[2] and there seems to be no reason for excluding employees of the defendant from its benefit when they sue under the Employers' Liability Act. In Aiken v. Holyoke St. R. Co., just cited, a boy of less than seven years of age jumped upon a street-car while it was in motion, and was later thrown off and injured. Mr. Justice Barker, for the court, said: "It certainly could not be said as matter of law upon the evidence that the plaintiff was hurt while attempting to steal a ride upon the car. If while at play he carelessly ran into the car, and if in attempting to save himself from the consequence of such a collision he found himself upon the car, the defendant could not rightfully disregard his peril if informed of it, and run its car as if nothing had occurred. The defendant had no right to the exclusive occupation of the street. It was at all times bound to use due and reasonable care to see that its car by its motion caused no unnecessary damage to persons rightly in the public street. There was abundant testimony that before the plaintiff was finally thrown from the car he was upon the step in a place of comparative safety very near to and in full view of the motorman and requesting the motorman to let him off, and that the motorman, instead of stopping or attempting to stop the car, increased its speed and so caused the

[1] Louisville &c. R. Co. v. Banks, 104 Ala. 508; 16 So. 547.

[2] Pierce v. Cunard Steamship Co., 153 Mass. 87; 26 N. E. 415; Aiken v. Holyoke St. R. Co., 180 Mass. 8; 61 N. E. 557 (1901); Lovett v. Salem &c. R. Co., 9 Allen (Mass.) 557.

plaintiff to be thrown to the ground and run over. To be sure, this testimony was contradicted. But whether it was true or not was a question for the jury. If it was true, and if the plaintiff was not a trespasser attempting to steal a ride, to disregard the peril of a child of less than seven years of age, who by his own careless collision with a street-car was clinging frightened upon the step and to the handle of the car, calling for his mamma and to be let off, and to increase the speed of the car instead of attempting to comply with the child's request, is a course of conduct of such a clear and direct tendency to inflict serious injury as to be actionable, when practiced by one traveler towards another in a public street where both were lawfully present."

But this doctrine is applicable only when the negligence of the defendant is later in time than that of the plaintiff. If the negligent conduct of the two parties is contemporaneous, the plaintiff can not recover, if, by the exercise of due care, he could have avoided the consequences of the defendant's negligence.[1]

§ 154. Wilful, wanton, or intentional negligence.—In Southern R. Co. v. Moore (Ala.)[2] it was decided upon a review of the authorities by Chief Justice McClellan that under the Alabama Employers' Liability Act an employer is liable in damages for the wanton, wilful or intentional negligence of a superintendent, or of a person in charge or control, etc., or of a person entrusted with the duty of seeing that the ways, works or machinery were in proper condition.

In the case of Louisville &c. R. Co. v. York (Ala.)[3] it was further held that contributory negligence is no de-

[1] Murphy v. Deane, 101 Mass. 455, 466; 3 Am. R. 390; Palmer v. Gordon, 173 Mass. 410, 411; 53 N. E. 909.

[2] 128 Ala. 434; 29 So. 659 (1901).

[3] 128 Ala. 305; 30 So. 676 (1901).

fense when the act which caused the plaintiff's injury was wilful, wanton or intentional.[1]

In Central of Georgia R. Co. v. Lamb (Ala.)[2] it was ruled that an employer is not liable for negligence of an ordinary employee, even if it is wilful, wanton and intentional, which injures a coemployee; but merely for such negligence on the part of a responsible employee belonging to the class mentioned in the Employers' Liability Act, for whose simple negligence the common employer is rendered liable by the terms of that act.

In the cases cited in note[3] the terms "wilful and intentional wrong" and "wanton negligence" are defined, and the distinction between the two terms is pointed out by the court.[4]

§ 155. Employee's right to rely upon warning from person.—The surrounding facts and circumstances of the work may be such as to excuse an employee from using his eyes or ears to protect himself from danger, and to give him the right to rely upon a warning from some one else.[5] What are such facts and circumstances is sometimes a difficult question to decide. A few illustrations on both sides of the line will be given.

In Davis v. New York &c. R. Co. (Mass.)[6] the plaintiff, while repairing the defendant's track, was run down by

[1] See also, Highland Ave. &c. R. Co. v. Robbins, 124 Ala. 113; 27 So. 422 (1900).

[2] 124 Ala. 172; 26 So. 969 (1900).

[3] Louisville &c. R. Co. v. Anchors, 114 Ala. 492; 22 So. 279; 62 Am. St. 116 (1897); Birmingham R. Co. v. Bowers, 110 Ala. 328; 20 So. 345; Louisville &c. R. Co. v. Webb, 97 Ala. 308; 12 So. 374.

[4] See also, Louisville &c. R. Co. v. Richards, 100 Ala. 365; 13 So. 944; Stringer v. Alabama Mining Co., 99 Ala. 397; 13 So. 75; Georgia Pac. R. Co. v. Lee, 92 Ala. 262; 9 So. 230; Louisville &c. R. Co. v. Brown, 121 Ala. 221; 25 So. 609 (1899); 1 Thompson Neg. (2d ed.), §§ 18–23.

[5] Schultz v. Chicago &c. R. Co., 44 Wis. 638; Ditberner v. Chicago &c. R. Co., 47 Wis. 138; 2 N. W. 69; Maguire v. Fitchburg R. Co., 146 Mass. 379; 15 N. E. 904.

[6] 159 Mass. 532; 34 N. E. 1070.

a train. His work required him to face to the north and to bend over the track, so that he could not see trains approaching from the south. It was the duty of his section-boss or foreman of the gang to warn him of the approach of such trains. At the trial the evidence was conflicting as to whether this warning was given. It was held that the plaintiff was entitled to rely upon this warning, and that his doing so did not constitute contributory negligence. The court, by Holmes, J., says: "The defendant had put the plaintiff in a position in which the more closely he attended to his duty the less he was able to be on the watch, and had put a foreman there for the express purpose of warning him. Under such circumstances the jury well might say that the plaintiff was justified in relying on the foreman's doing what the defendant admitted that he was bound to do, and said that he did. A man alongside another in this way can make sure of his warning being understood. The case is not like one where the only warning relied on must come from the train."[1] As the failure to give the warning was the negligence of the defendant's superintendent, it was further held that the plaintiff was entitled to recover under the Massachusetts statute.[2]

In Lynch v. Boston &c. R. Co. (Mass.)[3] the plaintiff's intestate was killed by a shunted car while engaged in cleaning under a switch-bar in the defendant's yard. The work could only be done in a stooping position, which naturally withdrew his attention from approaching trains or cars. The plaintiff contended that the deceased was excused from using his eyes for his own protection, upon the ground that the defendant had given him the right to

[1] Davis v. New York &c. R. Co., supra, at p. 535.

[2] See also, Lynch v. Allyn, 160 Mass. 248; 35 N. E. 550; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. 501.

[3] 159 Mass. 536; 34 N. E. 1072.

rely upon being warned of the approach of a car or train. The strongest evidence of this was the statement of the section-foreman that he generally looked out for the men the best he could, and warned them, but that the men had to look out for themselves when they were in different parts of the yard, and that at the time of the accident the men were separated. The presiding judge ordered a verdict for the defendant, and the full court held that this ruling was correct, for the reason that the deceased in failing to use his eyes was guilty of negligence, and that he had no right to rely upon being warned either by the section-foreman or by a person on the approaching car. The case was stated by the court on page 538 to be "not so strong for the plaintiff as if the deceased had been run down by an engine, which ordinarily would have a man on the lookout."[1] Maguire v. Fitchburg R. Co. (Mass.)[2] was distinguished on the ground that in that case "there was an implied assurance that the use of the track was suspended." Page 537, by Holmes, J.

§ 156. Same.—In Donahoe v. Old Colony R. Co. (Mass.)[3] the plaintiff was jammed between an engine and a car, while he was attempting to uncouple the car, by reason of a broken draw-bar. The plaintiff was a brakeman, and during a temporary absence from his post the conductor chained to the engine a car with a broken draw-bar, and omitted to inform the plaintiff of the fact. He was ignorant of this danger, and in the course of his duty he stepped into the freight-car chained to the engine, and, without looking down to see, with the aid of his lantern, whether the draw-bar was all right, he called to the en-

[1] Citing Shea v. Boston &c. R. Co., 154 Mass. 31; 27 N. E. 672; Aerkfetz v. Humphreys, 145 U. S. 418, 420; 12 S. Ct. 835. See also, Railway Co. v. Murphy, 50 Ohio St. 135; 33 N. E. 403.

[2] 146 Mass. 379; 15 N. E. 904.

[3] 153 Mass. 356; 26 N. E. 868.

gineer to back the engine so that he could pull out the coupling-pin easily. The engine was backed quickly, and by reason of the broken draw-bar the tender came in close contact with the forward end of the car upon which the plaintiff stood, and crushed his leg. It was held that the jury was justified in finding that the proximate cause of the injury was the conductor's omission to inform the plaintiff of the broken draw-bar, and that the plaintiff was in the exercise of due care and diligence. The conductor having been in charge of the train, it was further held that the common employer was liable in damages under the statute for the injury.

In Steffe v. Old Colony R. Co. (Mass.),[1] a car-inspector, while inspecting a moving train, was struck by another moving train. The evidence tended to show that it was customary to inspect moving trains; that the other train came upon the plaintiff unexpectedly and rapidly, without any warning from the brakeman on the approaching train, who was stationed there to give warning or to stop the train. It was held that the jury was warranted in finding that the plaintiff was in the exercise of due care and diligence, under the terms of the statute. The circumstances were such as to entitle the plaintiff to rely upon a warning from the brakeman who was in charge or control of the train.[2] The failure to give this warning was the negligence of a person for whose acts the railroad company was liable. Hence the plaintiff was entitled to recover damages.

It is not essential, however, that the warning should be given by a superintendent, or other person in charge or control of the injured employee. If it is duly given by a coemployee, it is sufficient to exonerate the common employer in an action under the act.[3]

[1] 156 Mass. 262; 30 N. E. 1137.

[2] Davis v. New York &c. R. Co., 159 Mass. 532; 34 N. E. 1070.

[3] Alabama Coal Co. v. Pitts, 98 Ala. 285; 13 So. 135.

§ 157. Warning from object.—The warning upon which an employee is entitled to rely may come from a part of the defendant's ways, works, or machinery, as well as from a person. Thus, in Maher v. Boston &c. R. Co. (Mass.)[1] a freight-brakeman was instantly killed by reason of his head coming in contact with a bridge, the approach to which was guarded by a telltale which was out of order. His duty required him to ride on the top of the rear end of the train, where there was a tall refrigerator-car, and to watch the rear end of the train with his face to the rear. He knew that there were low bridges under which the car must pass. In an action under the Employers' Liability Act, the defendant contended that the deceased was not in the exercise of due care in failing to keep a lookout for the bridge. But the court held that the circumstances justified him in relying upon the telltale for warning of his approach to the bridge, and that the jury was warranted in finding that he was in the exercise of due care and diligence. As the telltale was out of order and did not give the warning, a verdict for the plaintiff was sustained.

Where, however, the brakeman's duty does not require him to sit in a dangerous place, and he assumes such position merely for his own comfort or convenience, and he is familiar with the route and the location of the bridges, the fact of a defect in the bridge, and the absence of "whip-straps" or other warning signal near the bridge which knocks him off the train, will not render the employer liable under the Alabama act, because the brakeman is guilty of contributory negligence.[2]

§ 158. Inference of due care.—In a few cases where an employee has been killed and his death was not wit-

[1] 158 Mass. 36; 32 N. E. 950.

[2] Schlaff v. Louisville &c. R. Co., 100 Ala. 377; 14 So. 105.

nessed by any one, the Massachusetts court has held that an inference of his due care is justified if all the attending circumstances are in evidence and they fail to show any fault on his part. The mere absence of evidence of his fault will authorize a finding of due care.[1] This rule is an important qualification of the Massachusetts rule that the burden is upon the plaintiff to show due care. If direct and positive evidence of what the injured person was doing at the time of the injury were required, a plaintiff could never recover when the injury resulted in immediate death and no one witnessed the accident.

In Griffin v. Overman Wheel Co.[2] a night-watchman was found dead on the ground below a narrow unrailed bridge running between two buildings owned by the defendant. It was customary for him to pass over this bridge in making his rounds. The night of his death was cold, dark, and frosty, and the bridge was in a slippery condition. There was no direct and positive evidence as to what he was doing at the time he met his death, or as to how it was caused. In an action under the Massachusetts act of 1887, the presiding judge ruled, at the defendant's request, that there was no evidence that the deceased was in the exercise of due care, and ordered a verdict for the defendant. The circuit court of appeals, however, set aside the verdict and ordered a new trial, on the ground that the facts proved would justify the jury in the inference that he was in the exercise of due care.

§ 159. Selecting dangerous mode of performing work when safe way exists.—Contributory negligence may consist in choosing a dangerous mode of doing work when there is a safer way of performing the same duty.

[1] Caron v. Boston &c. R. Co., 164 Mass. 523; 42 N. E. 112; Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425; Maguire v. Fitchburg R. Co., 146 Mass. 379; 15 N. E. 904.

[2] 9 C. C. A. 542; 61 Fed. 568.

In Lothrop v. Fitchburg R. Co. (Mass.)[1] a freight-brakeman was killed by having his head crushed between the ends of two projecting timbers on two flat-cars while in the act of coupling them. He had been given general orders by the conductor to do the coupling, and had made several couplings on the north side of the track before the injury occurred. The timbers which killed him projected over the north side of the cars, and the coupling could have been safely done either from the south side of the track or from beneath the cars. It was about noon on a clear day, and there was nothing to distract his attention. In this action against the railroad company under the Employers' Liability Act, it was held that the danger was an obvious one, and that the deceased was not in the exercise of due care and diligence within the meaning of the act, and that the action could not be maintained. In delivering the opinion of the court, Mr. Justice Field says: "The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and when the servant has as good an opportunity as the master or as any one else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant can not recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care."[2]

Upon like facts it has been held that the employer was not liable at common law.[3]

So, if the uncoupling of cars in motion may be effected in safety while standing on the platform of one of them,

[1] 150 Mass. 423; 23 N. E. 227.

[2] Lothrop v. Fitchburg R. Co., supra, at pp. 424, 425.

[3] Boyle v. New York &c. R. Co., 151 Mass. 102; 23 N. E. 827.

an employee who goes in between them and attempts to uncouple them while in motion is guilty of contributory negligence, and can not recover under the Alabama Employers' Liability Act for a defect in the condition of the draw-head attached to one of the cars.[1]

In Tennessee Coal Co. v. Herndon (Ala.),[2] Mr. Justice Coleman for the court says, in an action under the statute: "If a party selects a dangerous way to perform a duty when there is a safe way, knowing the way selected to be dangerous, or if the danger is 'apparent' or 'obvious,' then he assumes the risk, and is guilty of contributory negligence." But in the same case it was held that the mere fact that an employee was injured because of the way selected by him, when if he had selected the other way he would have escaped injury, does not of itself constitute contributory negligence, and that the result of his action is not the true test of the question. In this case the plaintiff's intestate, while assisting the regular "dumper" in turning the cinder out of a large pot, was jerked into the pot by its sudden tilting over, and was killed by contact with the mass of molten cinder in the pot. At the time of the accident the deceased was standing on the trucks which supported the cinder-pot. The evidence was conflicting as to whether the ground or the trucks were the safer place to stand for this purpose. It was held that a verdict for the plaintiff was proper, there having been certain defects in the safety-chains and other apparatus connected with the pot.

In Louisville &c. R. Co. v. Orr (Ala.),[3] Mr. Justice Coleman, in delivering the opinion of the court, says: "If there was evidence to satisfy the jury that plaintiff's intestate selected a dangerous way to pass from one car

[1] Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283.
[2] 100 Ala. 451, 458; 14 So. 287.
[3] 91 Ala. 548, 554; 8 So. 360.

to another, knowing that the way selected was dangerous, when there was a safe way apparent to him, he was guilty of such contributory negligence as to constitute a full defense to the action."[1]

A workman who feeds a circular saw by means of his hand, knowing a safer practicable method, is not in the exercise of due care, and can not recover against his employer at common law for an injury to his hand caused by a defect in the saw.[2] An employee who, at the request of a fellow workman, mounts a ladder to repair a dangerous part of the machinery while it is in motion, instead of waiting to have it stopped, is guilty of contributory negligence, and can not recover for an injury caused by a defect in the ladder.[3]

§ 160. Same.—In Richmond &c. R. Co. v. Bivins (Ala.)[4] a freight-brakeman was pulled off the caboose, as he was boarding it after setting a switch, by his clothes catching in the switch. At the station where the accident happened the conductor gave the plaintiff this order: "Set up your switch; catch your caboose; hold the cars; cut them loose; run them on the side-track, and get away quick." In obedience to these instructions, the plaintiff set the switch, and, after the cars had passed from the main track on to the side-track, he stood near the switch waiting for the train to back down to him, and when the rear platform of the caboose reached him, he grasped the rails of the rear platform with both hands, put his left foot on the lowest step of the platform, and while in the act of drawing up his right foot the leg of his trousers was caught in the machinery of the switch, his right foot drawn back, his left foot slipped from the step, and both legs were drawn

[1] Citing Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 40 So. 146.
[2] Wilson v. Steel Edge Stamping Co., 163 Mass. 315; 39 N. E. 1039.
[3] Cahill v. Hilton, 106 N. Y. 512; 13 N. E. 339.
[4] 108 Ala. 142; 15 So. 515.

under the cars and cut off just below the knees. There was evidence tending to show that it was customary for brakemen on the defendant railroad to board trains in motion after setting switches, though it was not disputed that the brakeman could stop the train, if he chose to do so, and make it wait while he boarded it. It was held that, in boarding the train while in motion instead of making it stop and then boarding it, he was guilty of contributory negligence as matter of law, and that a verdict should have been ordered for the defendant. In the opinion by Mr. Justice Haralson it is said on page 517: "It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where one in the employ of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." The learned justice also states that, "with the loss of only a moment or two, he might have brought it [the train] to a standstill, to enable him to board it."[1] This case was followed with approval in Davis v. Western R. Co. (Ala.).[2]

In George v. Mobile &c. R. Co., just cited, it was decided that even an order to do uncoupling in an obviously dangerous way will not excuse a brakeman who does the work in that way, knowing a safer way to exist; and that

[1] This case seems to carry the doctrine of contributory negligence to an unwarrantable extent. The plaintiff was acting under orders to be quick and he would have violated these orders if he had brought the train to a standstill in order to enable him to board it in safety. The loss of even a moment or two, at each place where a switch is set for a freight-train, would greatly increase the running-time, and a brakeman who persisted in such conduct would not retain his position very long. In Massachusetts the case would have been submitted to the jury: Hannah v. Connecticut River R. Co., 154 Mass. 529; 28 N. E. 682; Lawless v. Connecticut River R. Co., 136 Mass. 1; Bowers v. Connecticut River R. Co., 162 Mass. 312; 38 N. E. 508.

[2] 107 Ala. 626; 18 So. 173. See also, Sanders v. McGhee, 114 Ala. 373; 21 So. 1006; George v. Mobile &c. R. Co., 109 Ala. 245; 19 So. 784.

such conduct amounts to contributory negligence as matter of law, which prevents a recovery under the Employers' Liability Act.

§ 161. Other illustrations of due care and contributory negligence.—Due care and diligence do not require a brakeman to abandon his post and jump from the car at the first instant that he discovers there is trouble with the brake, although the car is on a descending grade without a locomotive.[1]

In Sullivan v. Old Colony R. Co. (Mass.)[2] a switchman was killed by a locomotive-engine while in the act of recrossing the tracks after throwing a switch. The injury occurred in the daytime, at a time when a locomotive usually passed. He turned his back to the engine, and did not look around towards the engine until just before it struck him. In an action by his widow under the Employers' Liability Act, it was held that he was not in the exercise of due care and diligence at the time of the injury, and that the plaintiff could not recover.

In Browne v. New York &c. R. Co. (Mass.)[3] a brakeman was killed by a freight-car falling over upon him. He was sent to uncouple the caboose-car from the engine, in order that it might make a flying switch. The engineer slackened the speed of the train to let the brakeman pull out the coupling-pin, and, although the deceased did not succeed in pulling the pin out, he gave the signal for the engineer to go faster. The engineer increased the speed of the train, and as soon as the engine passed the switch the switchman threw the switch, the coupling held, the caboose-car was pulled off the track, and fell over and killed the brakeman. The pin and the hole in the stiff-

[1] Spaulding v. Flynt Granite Co., 159 Mass. 587; 34 N. E. 1134.
[2] 153 Mass. 118; 26 N. E. 240.
[3] 158 Mass. 247; 33 N. E. 650.

shackle were in good condition. In an action by the brakeman's dependent next of kin under the statute, it was held that the brakeman was guilty of contributory negligence in giving the signal to start faster before he had pulled out the pin, and that the plaintiff could not recover.

It is not contributory negligence for a switchman to stand upon the foot-board of an engine-tender in uncoupling a car from the tender, although a rule of the company forbids switchmen to go between the cars in coupling or uncoupling; and such act will not defeat a recovery under the Employers' Liability Act of Alabama.[1]

For other illustrations as to what conduct by an injured employee is or is not due care and diligence within the meaning of the Employers' Liability Act, see the cases cited in the note.[2]

[1] Richmond &c. R. Co. v. Jones, 92 Ala. 218; 9 So. 276.

[2] Graham v. Boston &c. R. Co., 156 Mass. 4; 30 N. E. 359; McLean v. Chemcial Paper Co., 165 Mass. 5; 42 N. E. 330; Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. 501; Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146; Louisville &c. R. Co. v. Woods, 105 Ala. 561; 17 So. 41.

CHAPTER X.

NOTICE.

SECTION
162. Statutes relating to notice.
163. Requirement of notice constitutional.
164. Prior notice necessary.
165. Written notice required.
166. Service of notice on corporations and individuals.
167. Service of notice by post.
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171. Notice must show that it was intended as the basis of a claim for damages.
172. Notice of the "time" of the injury.
173. Notice of the "place" of the injury.
174. Notice of the "cause" of the injury.
175. No intention to mislead, etc.
176. Conflict of laws on notice.

§ 162. Statutes relating to notice.—The Massachusetts Revised Laws of 1902, ch. 106, § 75, read as follows: "No action for the recovery of damages for injury or death under the provisions of sections 71 to 74, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies without having given the notice and without having been for ten days at any time after

his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section 22 of chapter 51 shall apply to notices under the provisions of this section."[1]

The provisions of the Massachusetts Employers' Liability Act as amended by Statute 1888, chapter 155, relating to notice of the time, place and cause of the injury, seem to be taken from the statutes relating to injuries occasioned by defects in a highway of a city or town.[2] Decisions under cases relating to defects in a highway are therefore in point upon questions relating to notices given under the Employers' Liability Act of 1887, chapter 270, as amended by Statute 1888, chapter 155.

Until Mass. St. 1900, ch. 446, only thirty days were allowed for giving notice.

[1] Revised Laws of 1902, ch. 51, § 22, read as follows: "Section 22. A defendant shall not avail himself in defense of any omission to state in such notice the time, place or cause of the injury or damage, unless, within five days after receipt of a notice, given within the time required by law and by an authorized person, referring to the injuries sustained and claiming damages therefor, the person receiving such notice, or some person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient and requests forthwith a written notice in compliance with law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to the time, place and cause of the injury or damage, such notice shall have the effect of the original notice, and shall be considered a part thereof."

[2] Gustafsen v. Washburn &c. Mfg. Co., 153 Mass. 468, 472; 27 N. E. 179, per Field, C. J.; citing Mass. Pub. Sts., ch. 52, §§ 19, 21; St. 1882, ch. 36.

The provisions of the New York and Colorado acts are very like those of Massachusetts upon this subject, except that in New York one hundred and twenty days are allowed.[1] The Alabama act does not require notice to be given, nor does the Indiana statute.

§ 163. Requirement of notice constitutional.—A statute requiring written notice of the time, place and cause of a personal injury caused by negligence to be given within a certain time after the injury is received, is a constitutional exercise of legislative power. "Such requirement is not a denial or unreasonable abridgment of the right to obtain redress for an injury occasioned by a neglect to perform the duty thus imposed; it is simply a restriction, deemed by the legislature to be reasonable, upon the exercise of such right. We think the legislature has the power to impose such a restriction."[2]

§ 164. Prior notice necessary.—Where notice is required, no action can be maintained under the Employers' Liability Acts unless notice of the injury has been given before the action is brought. The mere bringing of the action is not sufficient notice.[3] "The requirement of notice is held to make a condition precedent to the right to bring an action, not on a nice interpretation of the particular words used, but upon a general view of what the legislature would be likely to intend."[4] The making out of the writ is deemed the bringing of the action within the meaning of this rule. If the writ be made

[1] Colo. Laws of 1893, ch. 77, § 2; N. Y. Acts 1902, ch. 600, § 2.

[2] Shalley v. Danbury R. Co., 64 Conn. 381, 387; 30 Atl. 135, per Torrance, J., for the court; Lomburth v. Winchester Ave. R. Co., 76 Fed. 348.

[3] Foley v. Pettee Machine Co., 149 Mass 294, 296; 21 N. E. 304; 4 L. R. A. 51; Moyle v. Jenkins, 8 Q. B. D. 116, 118; Keen v. Millwall Dock Co., 8 Q. B. D. 482, 484.

[4] Veginan v. Morse, 160 Mass. 143, 146; 35 N. E. 451, per Holmes, J.

out in the morning and the notice be served in the afternoon of the same day, the action can not be maintained.[1]

Notice of the time, place and cause of an injury to an employee is only necessary where the complaint is based upon the Employers' Liability Act. When the right of action for personal injury to an employee existed at common law, or by statute passed before the passage of the Employers' Liability Act, the plaintiff is not obliged to give the notice required by this act.[2] An employee's rights are not lessened or restricted in any way by this act; on the contrary the chief purpose of the act was to extend and increase his rights.

§ 165. Written notice required.—The Massachusetts act of 1887 did not expressly require the notice to be in writing; but by the amendment passed in 1888[3] written notice was rendered necessary to the maintenance of an action under the statute.

In England, although the statute does not in terms require written notice, yet the provisions relating to giving the name and address of the person injured, and to serving the notice by post, etc., have been held to show that the notice must be in writing.[4]

In Keen v. Millwall Dock Co., just cited, the plaintiff made a verbal report of his injury to the defendant's inspector, who took down the details in writing and sent them to the superintendent. Afterward the plaintiff's solicitor wrote a letter to the defendant, stating that he was instructed to apply for compensation for the injury, "particulars of which have already been communicated to your superintendent." It was held by the court of

[1] Veginan v. Morse, 160 Mass. 143; 35 N. E. 451.
[2] Colorado Milling &c. Co. v. Mitchell, 26 Colo. 284; 58 Pac. 28.
[3] Stat. 1888, ch. 155, § 1.
[4] Moyle v. Jenkins, 8 Q. B. D. 116; Keen v. Millwall Dock Co., 8 Q. B. D. 482.

appeal that the notice was not in writing, and that the action could not be maintained.

§ 166. Service of notice on corporations and individuals.—The New York Employers' Liability Act of 1902 and the English act of 1880 contain specific directions concerning the service of the notice upon the employer. The acts of the other states do not make such directions.

The New York act provides by section 2: "The notice required by this section shall be served on the employer, or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation."

In Shea v. New York &c. R. Co. (Mass.)[1] the notice was taken to the office of the general superintendent of the defendant corporation, and upon inquiry being made for him and being informed that he was absent the notice was left for him there with a person whose dress and manner indicated that he was a clerk in the office. It was held that these facts would warrant a finding, in the absence of anything to the contrary, that the notice speedily came into the hands of the superintendent, and that the duties of the superintendent were such as to make him a proper person to represent the corporation in re-

[1] 173 Mass. 177; 53 N. E. 396.

ceiving such a notice; and it was added by Mr. Justice Knowlton for the court (page 179): "The statute does not require service of a notice in any prescribed way. Notice is to be 'given to the employer within thirty days.'[1] Without reference to the modes of service prescribed by the law in ordinary cases when notice is to be given it is enough under this statute if a notice in proper form from the employee comes into the hands of the employer within thirty days after the accident."

The Statute of 1884, chapter 330,[2] requires foreign corporations to appoint the commissioner of corporations their agent or attorney for the purpose of receiving service of "lawful processes in any action or proceeding." In Healy v. George F. Blake Mfg. Co. (Mass.)[3] the plaintiff served written notice in due form upon the commissioner of corporations; the commissioner of corporations made a true copy of the original notice and sent this copy to the defendant, which was a foreign corporation doing business in Massachusetts. This copy was received by the defendant within thirty days after the accident, and before the date of the writ. It was held that this notice was not sufficient to warrant a recovery under the Employers' Liability Act. The commissioner of corporations had no authority to act as agent or attorney of the plaintiff in making or mailing this copy of notice to the defendant, nor on the other hand was he the agent or attorney for the defendant for any purpose except that of receiving lawful process in any action or proceeding, and it was held that a written notice under the Employers' Liability Act was not "process" in any action, within the meaning of the Statute of 1884, chapter 330.[4]

[1] Stat. 1887, ch. 270, § 3.

[2] Rev. laws 1902, ch. 126, § 4.

[3] 180 Mass. 270; 62 N. E. 270 (1902).

[4] The term "process" seems to apply only to that which issues from a court of justice; the fact that a notice, or summons, or other paper is

The Massachusetts Employers' Liability Act requires notice to be "given to the employer." The employer, however, may be bound by a practice of receiving and accepting notices given to the employer's agent. Thus, in De Forge v. New York &c. R. Co. (Mass.)[1], the notice was given to the defendant's freight-agent at Springfield, Mass., who sent it to the defendant's attorney in New Haven, Conn., in pursuance of general printed instructions, and it appeared that he had received such notices for five years. It was held that this evidence warranted a finding that the defendant had recognized and acquiesced in this practice, and was bound by this form of service of notice. The court refrained from deciding whether or not an attorney or a freight-agent had authority to receive service of notice for the corporate employer.

Service of notice upon the president of the defendant corporation, if it be addressed to another corporation of which the same man is also president, is not sufficient under the Massachusetts Employers' Liability Act, even if the latter corporation is leased to the defendant corporation. The notice is not served on the defendant, but on another corporation; and the Statute 1894, chapter 389, relative to notices in cases of injuries to persons or property, does not apply, because there is no omission to state the time, place, or cause of the injury correctly.[2]

For other cases involving questions concerning the service of the notice see the foot-note.[3]

one step in an action at law or suit in equity does not render it "process," if it comes from an individual, even from an attorney at law: Dwight v. Merritt, 18 Blatch. 305; Ex parte Davis, 41 Maine 38; Whitney v. Blackburn, 17 Ore. 564; 21 Pac. 874; 11 Am. St. 857; Porter v. Vandercook, 11 Wis. 70; Hanna v. Russell, 12 Minn. 80; Gilmer v. Bird, 15 Fla. 410.

[1] 178 Mass. 59; 59 N. E. 669 (1901).

[2] Harding v. Lynn &c. R. Co., 172 Mass. 415; 52 N. E. 535.

[3] Wormwood v. City of Waltham, 144 Mass. 184; 10 N. E. 800 (highway); McCabe v. City of Cambridge, 134 Mass. 484 (highway); Lyman

§ 167. Service of notice by post.—The New York Employers' Liability Act declares that the notice, "if served by post, shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post."[1]

If the plaintiff proves that a notice properly addressed, with postage prepaid, is put into the post-office or delivered to the postman in time, may the defendant invalidate the notice by proof that the notice was not delivered within the time required by the Employers' Liability Act?

This clause of the New York act appears to be taken from the English act of 1880.[2]

Under the English act it has been decided that a notice mailed within the six weeks allowed by the statute, but which would not be delivered in the ordinary course of post until after the six weeks had elapsed, would not support an action.[3]

In the absence of statute, it is well settled in Massachusetts, New York and elsewhere, that there is a presumption of fact, but not of law, that a letter put into the post-office, properly addressed and postage prepaid, will be delivered in the ordinary course of the mails.[4] It follows, therefore, if the defendant offers evidence that the notice was not delivered at his residence or place of busi-

v. Hampshire Co., 138 Mass. 74 (highway); Leonard v. City of Holyoke, 138 Mass. 78 (highway).

[1] New York Acts of 1902, ch. 600, § 2.

[2] 43 & 44 Vict., ch. 42, § 7.

[3] McDonagh v. MacLellan, 13 Sc. Sess. Cas. (4th series) 1000. See also, Field v. Mann, 42 Vt. 61 (1869).

[4] Huntley v. Whittier, 105 Mass. 391; 7 Am. R. 536; Crane v. Pratt, 12 Gray (Mass.) 348; President &c. v. Crafts, 4 Allen (Mass.) 447; Howard v. Daly, 61 N. Y. 362; 19 Am. R. 285 (1875); Montelius v. Atherton, 6 Colo. 224; Tanner v. Hughes, 53 Pa. St. 289; Walworth v. Seaver, 30 Vt. 728; 73 Am. D. 332; Rosenthal v. Walker, 111 U. S. 185; 4 S. Ct. 382; Atherton v. Atherton, 181 U. S. 155, 171; 21 S. Ct. 544; Dunlop v. Higgins, 1 H. L. Cas. 381.

ness within the statutory period, this raises an issue of fact, and the evidence must be weighed with all the other circumstances of the case in determining the validity of the service by mail.[1]

The validity of the service of the notice by post does not depend upon its actual receipt by or delivery to the employer within the one hundred and twenty days allowed by the New York act, but apparently, under this clause, upon the mailing of the notice in time for it to reach the employer's last known place of residence or place of business within that time "in the ordinary course of the post." If the notice is mailed in such time, it seems to be a sufficient service under the act, although it is delayed, or lost, or stolen, or never reaches the employer. The plaintiff seems to have done all that the law requires, and the defendant must bear the loss or inconvenience occasioned by the fault or neglect of the postal authorities, or the act of a thief. These persons are not the agents or servants of the employee any more than of the employer, and the statute seems to exempt the former but not the latter from responsibility for their acts.

Even if the letter be not addressed to the employer's present residence or place of business, but to his "last known" place of residence or of business, if the employee has acted in good faith upon the best evidence obtainable by him, in addressing it to such place, this does not invalidate the notice, and the question of fact should be submitted to the jury.[2]

§ 168. Notice "in behalf of" the injured employee.— Where the notice under the Employers' Liability Act is

[1] Austin v. Holland, 69 N. Y. 571; 25 Am. R. 246 (1877); McCoy v. Mayor &c., 46 Hun (N. Y.) 268 (1887); Crane v. Pratt, 12 Gray (Mass.) 348; Marston v. Bigelow, 150 Mass. 45; 22 N. E. 71; 5 L. R. A. 43.

[2] Marston v. Bigelow, 150 Mass. 45; 22 N. E. 71; 5 L. R. A. 43; Martin v. Pond, 30 Fed. 15 (1887); Rittin v. Griffith, 16 Hun (N. Y.) 454.

signed by an attorney at law, it will be presumed, in the absence of anything to the contrary, that he had authority to sign it in behalf of the injured employee, and his declaration that he had authority, or even his assumption of authority, is prima facie sufficient.[1]

In Steffe v. Old Colony R. Co., just cited, the notice was signed, "Frank Steffe, by G. F. W., his attorney," and no evidence was offered that the notice was given by direction of the plaintiff or that Mr. W. was in fact authorized to sign and serve it. It was held that the notice was sufficient, for the reason that no formal proof was necessary to show that Mr. W. was an attorney at law, and that if any express authority to give the notice was necessary it would be presumed that he had it in the absence of anything to show the contrary.

The notice must be signed by some one having authority to sign in behalf of the injured employee. An attested copy of the notice, if duly served by an officer qualified to serve citations and notices, has been held to be sufficient under the statutes relating to highway defects,[2] and would seem to be sufficient under the Employers' Liability Act. A notice signed by the physician of the injured employee which does not purport to be given in behalf of the employee is not sufficient to warrant a recovery under the Employers' Liability Act. Thus, in Driscoll v. City of Fall River (Mass.),[3] two papers were relied on as showing that sufficient notice had been given to the defendant on

[1] Steffe v. Old Colony R. Co., 156 Mass. 262; 30 N. E. 1137; citing Manchester Bank v. Fellows, 28 N. H. 302; Inhabitants &c. v. Bennett, 23 Maine 420; Penobscot Boom Co. v. Lamson, 16 Maine 224; 33 Am. D. 656; Proprietors &c. v. Bishop, 2 Vt. 231. See also, Dolan v. Alley, 153 Mass. 380; 26 N. E. 989; Spellman v. Inhabitants &c., 131 Mass. 443.

[2] Whitney v. City of Lowell, 151 Mass. 212; 24 N. E. 47.

[3] 163 Mass. 105; 39 N. E. 1003.

behalf of the plaintiff. The first paper was headed "John Driscoll," and was a record of the events immediately preceding and connected with the accident to the plaintiff. The second paper was signed by the plaintiff's physician, and was a description of the injury sustained by the plaintiff as the result of his accident. It was held that it might be conjectured that the two papers were intended to be a notice to the defendant of the time, place and cause of the injury in accordance with the statute, but that they were insufficient because they did not purport to be given in behalf of the plaintiff.

It is not necessary that the notice should show on its face that it was signed in behalf of the plaintiff if that can be gathered from its terms. Thus, if the person signing it be the husband of the injured person and the notice states that the plaintiff was thrown from her carriage, caused by a defect in the road, for which "we will be obliged to make a claim on your town for damages," the notice is sufficient under the statutes relating to highway defects.[1]

In Higgins v. Inhabitants &c. (Mass.)[2] the plaintiff was injured by a defect in the highway, and her husband gave written notice in this form: "I hereby give notice that I hold the town of North Andover responsible for serious injuries sustained by my wife, Susie Bell Higgins." Although the town was not legally liable to the husband for such an injury to his wife, it was held that the situation of the parties might be taken into account in determining the meaning of the terms of such a notice, and that as it was proper and usual for a husband to act as the protector of the rights of his wife, it might be fairly gathered from the terms of the notice that the husband was acting

[1] Carberry v. Inhabitants &c., 166 Mass. 32; 43 N. E. 912.
[2] 168 Mass. 251; 47 N. E. 85.

for his wife and gave the notice as her agent and in her behalf, and that consequently the notice was sufficient.

A father, even before his appointment as administrator, who has the right of administration upon the estate of his son, is a person authorized to give notice under the statute relating to highway defects where the son has died without having given notice and without having been for ten days of sufficient mental or physical capacity to give notice.[1]

A parent may give notice in behalf of his minor child under the statute relating to highway defects,[2] and it seems to follow from the reasoning of this case that a parent may give notice under the Employers' Liability Act for an injury to his minor child. A widow may give notice in behalf of her deceased husband under the Employers' Liability Act, and, when her husband is instantly killed at least, she may authorize her attorneys to give notice in her behalf.[3]

When the defendant is a foreign corporation doing business within the state it will not be presumed that the commissioner of corporations has authority to sign or give notice in behalf of the injured employee, and a copy of a notice made by the commissioner of corporations and served upon the employer is not sufficient under the Employers' Liability Act, although he is authorized to receive service of legal process for the employer.[4]

It seems that if the name of the injured employee be signed at his request and in his presence by a third per-

[1] Taylor v. Inhabitants &c., 130 Mass. 494; Nash v. Inhabitants &c., 145 Mass. 105; 13 N. E. 376; Mass. St. 1881, ch. 236; Mass. Pub. Sts., ch. 52, § 21; Mass. Rev. Laws, ch. 51, § 21.

[2] Taylor v. Inhabitants &c., 130 Mass. 494.

[3] Gustafsen v. Washburn &c. Mfg. Co., 153 Mass. 468; 27 N. E. 179; Daly v. New Jersey Steel &c. Co., 155 Mass. 1; 29 N. E. 507.

[4] Healy v. George F. Blake Mfg. Co., 180 Mass. 270; 62 N. E. 270 (1902)

son, this would be a sufficient signing of the notice, within the meaning of the Employers' Liability Act.[1]

If the statute makes no exception for the cases of infants or minors, they can not maintain an action under the act unless notice is given by them, or in their behalf.[2]

A notice given in behalf of a minor by his guardian, or even by his next friend, seems to be sufficient.[3] This objection to the validity of the notice may be avoided probably by having the notice signed and given by the minor's attorney, or by the minor himself.

§ 169. Notice in case of instantaneous death.—When the employee is instantly killed, the notice required by the Massachusetts statute may be given either by some one in his behalf, as by his widow, within sixty days from the occurrence of the accident causing his death,[4] or by the executor or administrator within sixty days after his appointment.[5] Although it was intimated in Gustafsen v. Washburn &c. Mfg. Co. (Mass.)[6] that notice by an executor or administrator would not support an action by the next of kin, it was subsequently decided that such notice was sufficient for that purpose, on the ground, as stated by Mr. Justice Allen for the court, that "the statute was designed to extend the liability of employers for personal injuries suffered by employees in their service, and the requirements as to notice should receive a liberal construction."[7]

[1] Finnegan v. Lucy, 157 Mass. 439; 32 N. E. 656 (notice to a liquor-dealer by a wife not to sell liquor to her husband).

[2] Madden v. Springfield, 131 Mass. 441 (highway).

[3] Tennessee Coal &c. Co. v. Hayes, 97 Ala. 201; 12 So. 98; Madden v. City of Springfield, 131 Mass. 441; Burke v. Burke, 170 Mass. 499; 49 N. E. 753; Jennings v. Collins, 99 Mass. 29; 96 Am. D. 687; Miles v. Boyden, 3 Pick. (Mass.) 213.

[4] Gustafsen v. Washburn &c. Mfg. Co., 153 Mass. 468; 27 N. E. 179.

[5] Daly v. New Jersey Steel &c. Co., 155 Mass. 1; 29 N. E. 507.

[6] 153 Mass. 468; 27 N. E. 179.

[7] Daly v. New Jersey Steel &c. Co., supra.

§ 170. "Physical or mental incapacity" of the injured employee.—The Employers' Liability Acts of Massachusetts and of New York provide "if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in this section he may give the same within ten days after such incapacity is removed." Under the Massachusetts act it has been held that the injured employee must be mentally as well as physically incapacitated in order to obtain the benefit of this extension of time. If he be physically incapacitated from giving a notice personally, but mentally capable of giving the notice through others, he does not fall within the benefit of this saving clause.[1]

As to what is or is not sufficient evidence to warrant a finding that the deceased was suffering from "physical or mental incapacity," so as to excuse the failure to give notice within the ordinary period of time, see further cases cited below.[2]

§ 171. Notice must show that it was intended as the basis of a claim for damages.—Where the evidence failed to show that the notice was intended as the basis of a claim against the defendant, or that it was given in behalf of the plaintiff, it was held that an action under the Employers' Liability Act could not be maintained.[3]

[1] Cogan v. Burnham, 175 Mass. 391; 56 N. E. 585; Ledgwidge v. Hathaway, 170 Mass. 348; 49 N. E. 656; Saunders v. City of Boston, 167 Mass. 595; 46 N. E. 98; May v. City of Boston, 150 Mass. 517; 23 N. E. 220; Lyons v. City of Cambridge, 132 Mass. 534.

[2] Saunders v. City of Boston, 167 Mass. 595; 46 N. E. 98 (highway); Barclay v. City of Boston, 167 Mass. 596; 46 N. E. 113; s. c. on second appeal, 173 Mass. 310; 53 N. E. 822 (highway); May v. City of Boston, 150 Mass. 517; 23 N. E. 220; Lyons v. City of Cambridge, 132 Mass. 534; McNulty v. City of Cambridge, 130 Mass. 275; Mitchell v. City of Worcester, 129 Mass. 525.

[3] Driscoll v. City of Fall River, 163 Mass. 105; 39 N. E. 1003. See also, Kenady v. City of Lawrence, 128 Mass. 318. But see Taylor v. Inhabitants &c., 130 Mass. 494; Savory v. City of Haverhill, 132 Mass.

§ 172. Notice of the "time" of the injury.—Under the Massachusetts act it is not necessary that the notice should state the hour when the injury occurred. A statement of the day is sufficient.[1] A like rule prevails under the statute relating to defects in highways.[2] In Taylor v. Inhabitants &c., ubi supra, notice that the injury was received on "Christmas morning" was held to sufficiently state the time of the accident.

§ 173. Notice of the "place" of the injury.—With respect to the place of the injury, under the Massachusetts Employers' Liability Act, the decisions under the statute giving a right of action for personal injuries caused by defects in the highway are in point.

As to what description of the "place" of an accident for an injury caused by a defect in a highway is sufficient under the statute of Massachusetts (Pub. Sts., ch. 52, § 18), see the cases cited below.[3]

As to what description of the place of a highway accident is not sufficient, see cases cited in the foot-note.[4]

324; and, since St. 1894, ch. 389, Higgins v. Inhabitants &c., 168 Mass. 251, 252; 47 N. E. 85 (1897).

[1] Donahoe v. Old Colony R. Co., 153 Mass. 356; 26 N. E. 868; Drommie v. Hogan, 153 Mass. 29; 26 N. E. 237.

[2] Taylor v. Inhabitants &c., 130 Mass. 494; Lyman v. Hampshire Co., 138 Mass. 74; Cronin v. City of Boston, 135 Mass. 110; Aston v. City of Newton, 134 Mass. 507.

[3] Hughes v. City of Lawrence, 160 Mass. 474; 36 N. E. 485; Connors v. City of Lowell, 158 Mass. 336; 33 N. E. 514; Richardson v. City of Boston, 156 Mass. 145; 30 N. E. 478; Pendergast v. Inhabitants &c., 147 Mass. 402; 18 N. E. 75; Lyman v. Hampshire Co., 138 Mass. 74; Sargent v. City of Lynn, 138 Mass. 599; Aston v. City of Newton, 134 Mass. 507; Welch v. Inhabitants &c., 133 Mass. 529.

[4] Gardner v. Inhabitants &c., 155 Mass. 595; 30 N. E. 363; Shallow v. City of Salem, 136 Mass. 136; Cronin v. City of Boston, 135 Mass. 110; Post v. Inhabitants &c., 131 Mass. 202; Miles v. City of Lynn, 130 Mass. 398; Donnelly v. City of Fall River, 130 Mass. 115.

§ 174. Notice of the "cause" of the injury.—In Beauregard v. Webb Granite &c. Co. (Mass.)[1] an employee was killed by a stone falling upon him through negligence in raising it without warning him. The notice to the employer stated that the deceased was killed "by a stone being precipitated upon him from your derrick as a result of your negligence, and of the negligence of some person for whose negligence you are liable." Held, that the cause of the injury was either stated with sufficient accuracy, or that the jury might have found it sufficient, on the ground that there was no intention to mislead, and that in fact the defendant was not misled by it.

In Donahoe v. Old Colony R. Co. (Mass.),[2] in which a freight-brakeman was injured by reason of the conductor's negligence in chaining a car with a broken draw-bar to the engine, and in failing to notify the plaintiff of the fact, it was held that the following notice stated the time, place, and cause of the injury with sufficient accuracy: "The Old Colony Railroad Company is hereby notified that on the fifteenth day of October, 1888, when within one hundred yards northerly from the railroad-station at Readville, Mass., on that part of the said Old Colony Railroad Company formerly known as the Boston and Providence Railroad Company, I was injured by my right leg being caught between the dump-car and tender of an engine, I at the time standing on the dump-car, which was the first car of a train of cars to which said tender of said engine was attached. Said injury was caused by reason of a broken draw-bar on the dump-car, which allowed the dolly varden on the tender of the engine to run up against the end of the dump-car, and which caught and injured

[1] 160 Mass. 201; 35 N. E. 555.
[2] 153 Mass. 356; 26 N. E. 868.

my leg.[1] This notice is given under the provisions of chapter 270 of the acts and resolves of Massachusetts of the year 1887, and of chapter 155 of said acts of the year 1888."

In Lynch v. Allyn (Mass.)[2] the notice stated the cause of the injury to be "the falling of a bank of earth." The proof was to the effect that the defendant's superintendent failed to station any one on the bank to warn the plaintiff of the danger of the bank's falling, and also failed to shore up the bank. It was objected that the notice was defective because it did not refer to the superintendent or to his conduct; but the court held that the cause of the injury was properly stated, and added that "it was not necessary for the plaintiff to state the cause of that cause."[3]

In Brick v. Bosworth (Mass.)[4] plaintiff's husband was instantly killed, and the notice stated the cause of the injury in these words: "The cause of the death of my said husband was the falling of a derrick upon him on account of the same being improperly or insecurely fastened." It was held that the notice was sufficiently full and specific to entitle the plaintiff to recover, either under the second clause, relating to the negligence of a superintendent, or under the first clause, relating to a defect in the condition of the ways, works, or machinery, etc.

A notice is not rendered defective by alleging different causes for the employee's injury.[5]

In actions for defects in highways, the cases in the note[6]

[1] The facts stated in the report of the case show that the chief cause of the injury was the negligence of the conductor in omitting to inform the plaintiff of the broken draw-bar.

[2] 160 Mass. 248; 35 N. E. 550.

[3] Per Lathrop, J., for the court, p. 255.

[4] 162 Mass. 334; 39 N. E. 36.

[5] Coughlan v. City of Cambridge, 166 Mass. 268; 44 N. E. 218.

[6] Young v. Inhabitants &c., 157 Mass. 383; 32 N. E. 354; Richardson v. City of Boston, 156 Mass. 145; 30 N. E. 478; Pendergast v. Inhabitants &c., 147 Mass. 402; 18 N. E. 75; Canterbury v. City of Boston, 141

contain illustrations of sufficient descriptions of the "cause" of the injury.

For insufficient statements of the "cause" of a highway accident, see cases cited in the note.[1]

§ 175. No intention to mislead, etc.—In Drommie v. Hogan (Mass.)[2] the notice stated the cause of the plaintiff's injury to be "by reason of a defective or insufficient staging, and the fall of the staging." The plaintiff's proof showed that the cause of the injury was a defective condition of a ledger-board, which broke and caused the staging to fall. The defendant contended that he was misled by the notice, and testified that he did not know what defect was referred to in the notice, or that the ledger-board was broken. The evidence showed further, however, that shortly after the injury the defendant came to the place where it happened and assisted in taking away the injured man; and that the staging and the broken ledger-board then lay in a heap upon the ground. The court held that even if the notice was defective in stating the cause of the injury, which the court did not decide, still the evidence warranted the jury in finding that the plaintiff had no intention to mislead the defendant, and that the latter was not in fact misled thereby.

In actions against cities or towns for defects in the

Mass. 215; 4 N. E. 808; Grogan v. City of Worcester, 140 Mass. 227; 4 N. E. 230; Davis v. Inhabitants &c., 140 Mass. 422; 5 N. E. 473; Dalton v. City of Salem, 136 Mass. 278; Aston v. City of Newton, 134 Mass. 507; McCabe v. City of Cambridge, 134 Mass. 484; Welch v. Inhabitants &c., 133 Mass. 529; Bailey v. Inhabitants &c., 132 Mass. 441; Whitman v. Groveland, 131 Mass. 553; Taylor v. Inhabitants &c., 130 Mass. 494.

[1] Roberts v. Inhabitants &c., 140 Mass. 129; 2 N. E. 775; Lyon v. City of Cambridge, 136 Mass. 419; Cronin v. City of Boston, 135 Mass. 110; Shea v. City of Lowell, 132 Mass. 187; Dalton v. City of Salem, 131 Mass. 551; Madden v. City of Springfield, 131 Mass. 441; Noonan v. City of Lawrence, 130 Mass. 161; Miles v. City of Lynn, 130 Mass. 398.

[2] 153 Mass. 29; 26 N. E. 442.

highways, the statute contains like provisions respecting an absence of intention to mislead. As to what notices are or are not sufficient under this clause, see cases cited in the note.[1]

§ 176. Conflict of laws on notice.—When the state of injury and the state of action are different and have different statutory regulations concerning notice of the injury, which shall control?

The general rule is that a statute of the state of injury which goes only to the remedy, is local; but that a statute which goes to the substantive right is a bar in all jurisdictions.

When the statute sued upon declares as a condition of recovery that notice shall be given within a definite time, this provision seems to be a matter of substantive right which will be recognized and enforced by the courts of other civilized countries.[2]

[1] Fuller v. Inhabitants &c., 162 Mass. 51; 37 N. E. 782; Norwood v. City of Somerville, 159 Mass. 105; 33 N. E. 1108; Veno v. City of Waltham, 158 Mass. 279; 33 N. E. 398; Gardner v. Inhabitants &c., 155 Mass. 595; 30 N. E. 363; Bowers v. City of Boston, 155 Mass. 344; 29 N. E. 633; 15 L. R. A. 365; Fortin v. Inhabitants &c., 142 Mass. 486; 8 N. E. 328; Liffin v. Inhabitants &c., 145 Mass. 549; 14 N. E. 787; Canterbury v. City of Boston, 141 Mass. 215; 4 N. E. 808.

[2] Glynn v. Central R. Co., 175 Mass. 510, 513; 56 N. E. 698; Stern v. La Compagnie Generale Transatlantique, 110 Fed. 996 (1901).

CHAPTER XI.

LIMITATION OF ACTIONS.

SECTION
177. Statutes, etc.
178. Amendment setting forth new cause of action, filed after statute of limitations has run.
179. Same—Injury received in another state.
180. Do exceptions or saving clauses in the general statute of limitations apply to actions under the Employers' Liability Acts?
181. Conflict of laws.
182. Same.
183. Same—When Employers' Liability Act does not limit time for action.
184. Same—When right exists at common law.
185. Constitutionality.

§ 177. Statutes, etc.—The Massachusetts and New York acts provide that—

"No action for the recovery of compensation for injury or death under this act shall be maintained unless * * * the action is commenced within one year from the occurrence of the accident causing the injury or death."[1]

The period in Colorado is two years, and in England six months, or in case of death twelve months, from the time of death.[2]

The Indiana and Alabama Employers' Liability Acts prescribe no time for the commencement of action. The matter is therefore controlled by the general statute of limitations. In O'Kief v. Memphis &c. R. Co. (Ala.)[3] a close question arose; namely, whether an action under the Employers' Liability Act for the negligent killing of an employee was

[1] Mass. St. 1887, ch. 270, § 3; Mass. Rev. Laws 1902, ch. 106, § 75; N. Y. Acts 1902, ch. 600, § 2.

[2] Colorado Laws of 1893, ch. 77, § 2; 43 and 44 Vict., cap. 42, § 4.

[3] 99 Ala. 524; 12 So. 454.

governed by section 2589 of the code, prescribing two years for the negligent killing of a human being, or by section 2619, clause 6, providing that "actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated," shall be brought within one year. A majority of the court held, without assigning reasons, that the action was governed by the one-year period, and therefore barred in this case. It follows, à fortiori, that, where the employee's injury does not result in death, the action under the statute is barred in one year.[1]

In Clare v. New York &c. R. Co. (Mass.)[2] an action was brought under the Employers' Liability Act for conscious suffering, and within a year after judgment for the defendant, the second action was brought for the negligent killing of the plaintiff's intestate, both actions being founded upon the same accident. The second action was not "commenced within one year from the time of the injury causing the death," as required by the statute in question, and it was accordingly held that the action was barred.

§ 178. Amendment setting forth new cause of action, filed after statute of limitations has run.—The time limited for bringing suit under the Employers' Liability Act applies not only to the action itself, but also to an amendment to the declaration which sets forth a new and independent cause of action not embraced in the original declaration. If the statutory period has elapsed between the date of the injury and the date of filing the amendment, no recovery can be had upon the amended cause of

[1] See O'Shields v. Georgia Pac. R. Co., 83 Ga. 621; 10 S. E. 268; 6 L. R. A. 152; Louisville &c. R. Co. v. Woods, 105 Ala. 561; 17 So. 41.

[2] 167 Mass. 39; 44 N. E. 1054; s. c. on second appeal, 172 Mass. 211; 51 N. E. 1083.

action if it sets up a new cause of action.[1] This rule is well settled; the difficulty arises in applying it in practice, and in determining whether a given amendment involves a new cause of action within the meaning of the rule. If the amendment does not set up a new cause of action, but is merely a more specific statement of the original cause of action, it is deemed to relate back to the commencement of the action.

In Indiana the rule has been stated thus: An amendment to a complaint in an action for personal injuries to an employee, which does not introduce a new cause of action, has reference to the time of filing the original complaint, with respect to the statute of limitations.[2]

In Alabama the rule has been enforced with some strictness against plaintiffs. In Mohr v. Lemle (Ala.),[3] Mr. Chief Justice Brickell says for the court: "The whole doctrine of relation rests in a fiction of law adopted to subserve and not to defeat right and justice. When the amendment introduces a new right or new matter, not within the lis pendens and the issue between the parties, if, at the time of its introduction, as to such new right or matter, the statute of limitations has operated a bar, the defendant may insist upon the benefit of the statute, and to him it is as available as if the amendment were a new and independent suit."

In Alabama &c. R. Co. v. Smith (Ala.)[4] the original

[1] Sicard v. Davis, 6 Peters 124; Exposition Cotton Mills v. Western &c. R. Co., 83 Ga. 441; 10 S. E. 113; Smith v. Butler, 176 Mass. 38; 57 N. E. 322 (1900); East Tennessee Land Co. v. Leeson, 178 Mass. 206; 59 N. E. 639 (1901); Daly v. New Jersey Steel Co., 155 Mass. 1, 2; 29 N. E. 507 (1891); Atlanta &c. R. Co. v. Hooper, 92 Fed. 820; Costello v. Crowell, 134 Mass. 280 (1883); Sanger v. City of Newton, 134 Mass. 308 (1883).

[2] Peerless Stone Co. v. Wray, 152 Ind. 27; 51 N. E. 326; Chicago &c. R. Co. v. Bills, 118 Ind. 221; 20 N. E. 775.

[3] 69 Ala. 180, 183.

[4] 81 Ala. 229; 1 So. 723.

declaration averred that the plaintiff, being a passenger on the defendant railroad, was forcibly ejected from his seat before he reached his destination. The amendment set up that he was induced to leave his seat and to alight at the wrong station by the porter calling out the name of his station. It was held that the amendment presented a new cause of action, and that the action upon it was barred by the statute of limitations, as it did not relate back to the time of commencing the action.

Birmingham Furnace Co. v. Gross (Ala.)[1] was an action under the Alabama Employers' Liability Act for an injury resulting in the death of plaintiff's intestate. The original complaint contained several counts, alleging, in different forms, that his death had been caused by the defendant's negligence. An amendment setting forth the same acts, with the additional charge that the intestate acted in conformity to the orders of a person to whose orders he was bound to conform, was allowed by the trial court. It was held that the amendment was within the lis pendens; that it did not set up a new cause of action within the meaning of the rule; and that it was not barred, but related back to the time of the commencement of the action.[2]

In Louisville &c. R. Co. v. Woods (Ala.),[3] the complaint alleged that the plaintiff, who was a brakeman in the defendant's employ, was injured by "the negligence of defendant's agents, servants, or employees who were fellow servants upon said train with the plaintiff." The amendment, filed more than one year after the injury, alleged that the plaintiff's injury was caused "by the neg-

[1] 97 Ala. 220; 12 So. 36.

[2] See also, Alabama &c. R. Co. v. Chapman, 83 Ala. 453; 3 So. 813; Louisville &c. R. Co. v. Woods, 105 Ala. 561; 17 So. 41; City Council &c. v. Harris, 112 Ala. 614; 20 So. 955.

[3] 105 Ala. 561; 17 So. 41.

ligence of the engineer who had charge of the engine." It was held that the cause of action stated in the amendment was within the lis pendens of the original complaint and was therefore not barred.

In Texas & Pacific R. Co. v. Cox[1] the declaration alleged that a freight-conductor was injured while attempting to make a coupling of cars, because of the defective condition of the cross-ties and of the road-bed. The amendment, filed after the time allowed for bringing an action had elapsed, further averred that Cox, in coupling the cars, as it was his duty to do, was injured because the draw-head and coupling-pin were not suitable for the purpose for which they were to be used. It was held that the action was not barred, for the reason that, "as the transaction set forth in both counts was the same, and the negligence charged in both related to defective conditions in respect of coupling cars in safety, we are not disposed by technical construction to hold that the second count alleged another and different negligence from the first."[2]

In Atlantic &c. R. Co. v. Laird[3] it appeared that the action was originally brought against the Atlantic &c. R. Co. and the Atchison &c. R. Co. as joint tort-feasors, alleging that the Atlantic &c. R. Co. was chartered by statute of Massachusetts, and that the plaintiff was traveling on a first-class ticket. After the period of limitation had elapsed, the plaintiff amended by discontinuing against the Atchison &c. R. Co. and by alleging that the defendant Atlantic &c. R. Co. was chartered by act of congress, and that the plaintiff was traveling on a second-class ticket. It was held that this amendment did not introduce a new cause of action and that the action was not barred.

[1] 145 U. S. 593; 12 S. Ct. 905.
[2] Texas &c. R. Co. v. Cox, supra, at p. 604.
[3] 164 U. S. 393; 17 S. Ct. 120.

In Texas &c. R. Co. v. Grimes (Tex.)[1] it was held that a declaration alleging merely that the defendant had failed to employ the plaintiff may be amended, after the statute of limitations has fully run, by alleging also a breach of an agreement to pay a certain amount during plaintiff's disability.

§ 179. Same—Injury received in another state.—In Union Pac. R. Co. v. Wyler,[2] the plaintiff, while in the employ of the defendant railroad, was injured in April, 1883, in the state of Kansas. The action was brought in a state court of Missouri in September, 1885, and was removed to the federal court for that district. The original declaration based the action upon the incompetency of a fellow servant, one Kline, through whose negligence the injury occurred. In November, 1888, more than five years after the injury occurred, the plaintiff, with the defendant's consent, filed an amended petition, grounding his action upon the Kansas statute of 1874, which is quoted in the foot-note.[3] The Missouri period of limitation for personal injuries was five years, and this was pleaded as a defense to the amended petition. The question was therefore directly presented whether or not the amendment set forth a new cause of action. The court held that it did set forth a new cause of action, and that the action was therefore barred by the Missouri statute of limitations. It was further decided that the limitation bar was not prevented from attaching by the fact that the amendment was filed by consent; nor by the fact that the

[1] (Tex. Civ. App.) 29 S. W. 1104.

[2] 158 U. S. 285; 15 S. Ct. 877.

[3] "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining damage:" Laws of Kansas, 1874, ch. 93, § 1.

federal courts take judicial notice of the laws of all the states, though the conclusion was said to be "strengthened" (page 295) by the rule of law prevailing in Missouri,[1] as well as in most of the states, that a statute of a sister state is regarded as matter of fact, which must be pleaded and proved. As the original petition relied merely upon the general common-law liability of a master for employing an incompetent servant, the amendment, setting up a special liability founded upon a statute of another state, was held to be a departure in pleading, averring a new cause of action, upon which the statute of limitations ran from the time of the injury to the time of the filing of the amendment, and did not relate back to the commencement of the suit.

In Bolton v. Georgia Pac. R. Co. (Ga.)[2] the same question was decided respecting the Alabama Employers' Liability Act. The plaintiff, while in the employ of the defendant railroad, was injured in Alabama and brought this action in Georgia. The original declaration was founded on the common-law liability of the employer for furnishing defective material. The amendment, offered after the Georgia statute of limitations had run, set up a liability conferred by the Alabama statute in terms. The facts alleged in both were substantially alike, and the plaintiff argued that simply to mention the Alabama statute in the amendment, and recite the same facts, would not set up a new cause of action. But the court held that the amendment offered did set up a new cause of action, and that the trial judge properly refused to allow the amendment, because the cause of action stated therein was barred.

In Nashville &c. R. Co. v. Foster (Tenn.),[3] however, a

[1] Babcock v. Babcock, 46 Mo. 243.
[2] 83 Ga. 659; 10 S. E. 352.
[3] 10 Lea (Tenn.) 351.

decision of a contrary tendency was rendered. A brakeman in the defendant railroad's employ was killed in Alabama, but the original declaration counted on the Tennessee statute apparently; at least it did not state or rely upon the Alabama statute. After the limitation period had elapsed an amendment was allowed setting forth the Alabama statute. It was held that the amendment did not introduce a new cause of action, and that it related back to the time the action was commenced, and prevented the bar from attaching. It is possible, however, to distinguish this case from the two preceding cases on the ground that here the liability described, both in the original declaration and in the amendment, was a special statutory liability, while in the two preceding cases the liability alleged in the original declaration was a general common-law liability, and that alleged in the amendment was a special statutory liability.

If, however, the original declaration shows that the plaintiff relies upon the statute of the state of injury, and the foreign statute is merely pleaded in a defective manner, he may amend by setting out the statute properly, and such amendment will relate back to the time of bringing suit. This is not the addition of a new cause of action, but is merely a more correct statement of the original cause, and is therefore not barred unless the original action was barred.[1]

A like rule applies where the injury occurs in one state, whose statute giving the right of action also limits the time for action, and the suit is brought in another state, without declaring upon the statute of the state of injury. In such case the declaration can not be amended by adding a count on the foreign statute after the time prescribed by that statute for bringing suit has elapsed.[2]

[1] South Carolina R. Co. v. Nix, 68 Ga. 572; Bolton v. Georgia Pac. R. Co., 83 Ga. 659, 660; 10 S. E. 352.

[2] Selma &c. R. Co. v. Lacy, 49 Ga. 106.

§ 180. Do exceptions or saving clauses in the general statute of limitations apply to actions under the Employers' Liability Acts?—The Employers' Liability Acts contain no exceptions or saving clauses allowing further time to sue, while the general statutes of limitation contain various clauses of this nature. Thus, the general statute of Massachusetts gives minors and some others further time to sue. The question therefore arises, Do the usual saving clauses in the general statute of limitations apply to actions under the Employers' Liability Act, when that act itself contains no saving clause? If, as in Alabama, the Employers' Liability Act does not prescribe a period of limitation, but leaves the action subject to the terms of the general statute of limitations, it would seem that the exceptions and saving clauses in that statute would also apply to actions under the Employers' Liability Act.[1]

This question was raised by counsel, but was not decided by the court, in a case brought under the Alabama Employers' Liability Act in a federal court sitting in Alabama.[2] Where, however, the Employers' Liability Act sued upon prescribes a period of limitation without any saving clauses, it seems that the plaintiff is not entitled to the benefit of a saving clause in the general statute of limitations. Thus, it has been held in Mississippi that an infant suing under the Mississippi act for the negligent killing of its father by the defendant railroad company must bring the action within the year mentioned in that statute, and is not entitled to the benefit of a saving clause in the general statute of limitations allowing in-

[1] Louisville &c. R. Co. v. Sanders, 86 Ky. 259; 5 S. W. 563; Nelson v. Galveston &c. R. Co., 78 Tex. 621; 14 S. W. 1021; 22 Am. St. 81; 11 L. R. A. 391.

[2] Alabama &c. R. Co. v. Carroll, 84 Fed. 772, 777; 28 C. C. A. 207 (1898).

fants who are not represented by any guardian, etc., further time to sue.[1]

In Elliott v. Brazil Block Coal Co. (Ind.)[2] it was decided that infants as well as adults suing under the statute for death by wrongful act are bound by the two-year period of limitation, as infants are not expressly excepted from this limitation, and no implied exceptions can be engrafted by the courts.[3]

It is well settled that the fact that a saving clause in a statute of limitations allows a new suit to be brought within a year after a nonsuit, or reversal, etc., of a former suit which was brought in time, does not allow such a second suit on a policy of insurance which limits the first suit to one year and makes no provision for a second suit.[4]

§ 181. Conflict of laws.—In statutes of this character, which create a new legal right unknown to the common law, time is regarded as of the essence of the right. The provision that no action shall be maintained unless brought within a certain time after the injury, is a condition attached to the right of action, and it operates as a limitation of the liability as created, and not merely of the remedy. When the action is brought after the expiration of the time limited it is barred, not only in the state

[1] Foster v. Yazoo &c. R. Co., 72 Miss. 886; 18 So. 380. See also, Taylor v. Cranberry Iron Co., 94 N. C. 525; Best v. Town of Kinston, 106 N. C. 205; 10 S. E. 997; Cavanagh v. Ocean Steam Nav. Co., 19 N. Y. Civ. Pro. 391; 13 N. Y. Supp. 540; Hill v. Supervisors, 119 N. Y. 344; 23 N. E. 921.

[2] 25 Ind. App. 592; 58 N. E. 736 (1900).

[3] See also, Murphy v. Chicago &c. R. Co., 80 Iowa 26; 45 N. W. 392 (1890); Foster v. Yazoo &c. R. Co., 72 Miss. 886; 18 So. 380 (1895); Hanna v. Jeffersonville R. Co., 32 Ind. 113 (1869); Hill v. Town of New Haven, 37 Vt. 501; 88 Am. D. 613 (1865); Pittsburg &c. R. Co. v. Hine, 25 Ohio St. 629 (1874).

[4] Riddlesbarger v. Hartford Ins. Co., 7 Wall. 386; Wilson v. Ætna Ins. Co., 27 Vt. 99; Hocking v. Howard Ins. Co., 130 Pa. St. 170; 18 Atl. 614; Arthur v. Homestead Ins. Co., 78 N. Y. 462; 34 Am. R. 550; Lewis v. Metropolitan Life Ins. Co., 180 Mass. 317; 62 N. E. 369 (1902).

of injury, but also in other states and in the federal courts. In the case of The Harrisburg[1] the plaintiff's husband was killed in a collision on navigable waters within the jurisdiction of Massachusetts in 1877. The suit, which was in rem against the negligent steamer, The Harrisburg by name, was brought in 1882, in the district court of the United States for Pennsylvania. Both the states of Massachusetts and Pennsylvania had statutes allowing actions for the negligent killing of a human being in certain cases, but they both required the action to be brought within one year after the injury in Massachusetts, and within one year after the death in Pennsylvania. It was held that the action could not be maintained, for the following reasons, stated by Mr. Chief Justice Waite on page 214: "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts could be maintained if brought or found after the expiration of the year; and it would seem to be clear that if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

[1] 119 U. S. 199; 7 S. Ct. 140.

The fact that in The Harrisburg, supra, the action was barred under the statute of the state of process, was immaterial. The mere fact that it was barred under the statute of the state of injury was sufficient to prevent a recovery. Thus, in Boyd v. Clark,[1] a like action, brought in a federal court sitting in Michigan for an injury received in Ontario after the time limited by the Ontario statute, was held to be barred, although the time prescribed by the Michigan statute had not elapsed. In delivering the court's opinion, Mr. Justice Brown says, on page 852: "The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and, either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any jurisdiction where the plaintiff may sue."[2]

§ 182. **Same.**—When the statute of the state of injury allows a longer period for the commencement of suit than is allowed by the state of process, the same principle is applied in favor of the plaintiff. That is, the plaintiff may maintain his action if the time limited by the statute of the state of injury has not elapsed, even if the time limited by the statute of the state of process has elapsed.

Thus in Therough v. Northern Pac. R. Co.[3] the plaintiff's intestate, a locomotive-engineer for defendant, was killed in Montana on Octobet 20, 1890. The Montana "damage act"[4] allowed three years for the bringing of such an action. The suit, however, was brought in Min-

[1] 8 Fed. 849.

[2] See also, Selma &c. R. Co. v. Lacy, 49 Ga. 106; O'Shields v. Georgia Pac. R. Co., 83 Ga. 621, 626; 10 S. E. 268; 6 L. R. A. 152; Halsey v. McLean, 12 Allen (Mass.) 438, 443; 90 Am. D. 157; Eastwood v. Kennedy, 44 Md. 563; Phillips v. Eyre, L. R. 6 Q. B. 1.

[3] 64 Fed. 84; 12 C. C. A. 52.

[4] Comp. Sts. Mont. 1887, §§ 981, 982.

nesota, whose "damage act" allowed only two years for such suits, on October 10, 1893—more than two years, but less than three years, after the injury. It was held, by the circuit court of appeals for the eighth circuit, that the action was not barred, and that it was governed by the law of Montana, following the principle of Boyd v. Clark.[1] In delivering the opinion, Mr. Justice Thayer says, on page 86: "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the terms of the act is enforceable by suit only within a given period, the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred. The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy. It follows, of course, that if the courts of another state refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, to that extent they refuse to give effect to the foreign law, and by so doing impair the right intended to be created."

But when the suit is in rem in the admiralty court a different rule has been applied.[2]

§ 183. Same—When Employers' Liability Act does not limit time for action.—The Alabama Employers' Liability Act does not prescribe a definite time within which an action under it must be brought. This is regulated by the general statute of limitations, which fixes the limitation upon actions for "any injury to the person or rights of another not arising from contract" at one year.[3]

[1] 8 Fed. 849.

[2] Stern v. La Compagnie Generale Transatlantique, 110 Fed. 996 (1901).

[3] Alabama Code of 1886, § 2619, cl. 6; O'Kief v. Memphis &c. R. Co., 99 Ala. 524; 12 So. 454.

In Georgia the period for such actions is two years. In an action brought in Georgia under the Alabama Employers' Liability Act for an injury received in Alabama, it appeared that the action was brought within two years, but not within one year, after the injury. It was held that the action was not barred, for the reason that, as the Alabama Employers' Liability Act failed to prescribe a limitation, the action was governed by the lex fori.[1] In delivering the court's opinion, Mr. Chief Justice Bleckley says, on page 625: "Where torts are committed in foreign countries, or beyond the territorial jurisdiction of the sovereignty in which the action is brought, the lex fori governs, no matter whether the right of action depends upon the common law or a local statute, unless the statute which creates or confers the right limits the duration of such right to a prescribed time."

It seems that the parties must have remained within the jurisdiction of the state of injury for its full period of limitation in order to bar the action in another state. In Canadian Pacific R. Co. v. Johnson,[2] decided by the circuit court of appeals in 1894, the plaintiff, while in the employ of the defendant, was injured in Canada on September 6, 1890. This action was brought on November 6, 1891, more than a year after the injury. By the code of Canada the right of action for such an injury was "absolutely extinguished" in one year. At the time of the injury the plaintiff was a citizen of Vermont. From the time of his injury on September 6, 1890, he remained in Canada until April, 1891, less than a year, and then returned to Vermont. The railway company was a Canadian corporation. It was held that, even assuming the Canadian statute to be one which extinguished a right of action,

[1] O'Shields v. Georgia Pac. R. Co., 83 Ga. 621; 10 S. E. 268; 6 L. R. A. 152.

[2] 61 Fed. 738.

the action was not barred, because the plaintiff had not remained in Canada for the full period of one year, and therefore the statute had not fully operated upon the right.

§ 184. Same — When right exists at common law.— When the right of action does not depend upon statute but exists at common law, the rule generally recognized is that an action for personal injuries received without the state of process, as well as within that state, is governed by its limitation laws.[1]

§ 185. Constitutionality.—A state legislature has the power to materially shorten the period of limitation relating to actions for personal injuries by negligence. A statute is not rendered unconstitutional by the circumstance that it applies to prior causes of action, if a reasonable time is left for instituting suit after its passage. An act which reduces the time for suing from six years to two years is constitutional, although it applies merely to personal injuries not resulting in death, and to no other causes of action. Such a statute relates to the remedy, and does not unduly abridge any vested right.[2]

[1] Johnston v. Canadian Pac. R. Co., 50 Fed. 886; Munos v. Southern Pac. R. Co., 51 Fed. 188; 2 C. C. A. 163; Nonce v. Richmond Co., 33 Fed. 429; Finnell v. Southern Kan. R. Co., 33 Fed. 427.

[2] Rodebaugh v. Philadelphia Traction Co., 190 Pa. St. 358; 42 Atl. 953 (1899); Bowden v. Philadelphia &c. R. Co., 196 Pa. St. 562; 46 Atl. 843 (1900).

CHAPTER XII.

THE MEASURE OF DAMAGES.

SECTION

186. Injury not resulting in death.
187. Injury resulting in death preceded by conscious suffering, or in death which is not instantaneous.
188. Injury resulting in instantaneous death, or in death not preceded by conscious suffering.
189. "Assessed with reference to the degree of culpability."
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192. When deceased employee is a minor.
193. Age, health, strength, capacity to earn money, and family of deceased, as elements of damage.
194. When the deceased leaves a widow or dependent next of kin—Apportionment of damages.
195. When the deceased leaves no widow or dependent next of kin.
196. Colorado rules.
197. Other cases.
198. Exemplary or punitive damages.
199. Excessive damages and how reduced.
200. Division of damages when employee's negligence has contributed to his injury.
201. Remote or conjectural damages.
202. Injury to married woman.
203. Money received from insurance company by employee as mitigation of damages.
203a. Fright without personal contact.

§ 186. Injury not resulting in death.—The Massachusetts statute limits the amount of damages recoverable by an employee when his injury does not result in death to a sum not exceeding four thousand dollars.[1] It does not prescribe any criterion for estimating the amount, but leaves the question to be settled upon general principles of

[1] Mass. St. 1887, ch. 270, § 3; Rev. Laws 1902, ch. 106, § 74.

law. The Colorado statute declares that the compensation "shall not exceed the sum of five thousand dollars."[1]

Where the employer has contributed to an insurance fund for the benefit of employees, the Massachusetts act further provides that he "may prove, in mitigation of the damages recoverable by an employee under this act, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society, on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto."[2]

The English statute provides that "the amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."[3] By section 5 of this act the amount of any penalty paid to the injured employee under any other statute is to be deducted from the compensation recovered under the Employers' Liability Act.

The Alabama statute does not prescribe a limit to the amount of damages recoverable in an action under the statute. In Mobile &c. R. Co. v. George (Ala.),[4] a brakeman recovered a verdict of $19,547 for the loss of both feet. In the same case, the court, by Mr. Justice Clopton, says on page 222: "Where the injury is permanent, the plaintiff, in actions of this character, may recover compensation for the disabling effects of the injury, past and prospective. In estimating the damages, the loss of

[1] Colo. Laws of 1893, ch. 77, § 2.
[2] Mass. St. 1887, ch. 270, § 6; Rev. Laws 1902, ch. 106, § 78.
[3] 43 & 44 Vict., cap. 42, § 3.
[4] 94 Ala. 199; 10 So. 145.

time, and the incapacity to do as profitable labor as before the injury, as well as the mental and physical suffering caused by it, are pertinent and legitimate factors."[1]

§ 187. Injury resulting in death preceded by conscious suffering, or in death which is not instantaneous.—In this case the Massachusetts act, as amended by the Statute of 1892, ch. 260, § 1, provides that—

"The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered; and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

Under the original Massachusetts act of 1887, the employer was liable in damages for the conscious suffering of the deceased employee, but was not liable in addition thereto for his death as a substantive cause of action.[2] The amendment of 1892, therefore, introduced a new element of damage.

§ 188. Injury resulting in instantaneous death, or in death not preceded by conscious suffering.—The Massachusetts statute of 1892, chapter 260, section 2, provides that—

"In case of death which follows instantaneously, or without conscious suffering, compensation in lieu thereof

[1] Citing South &c. Alabama R. Co. v. McLendon, 63 Ala. 266; Alabama &c. R. Co. v. Yarbrough, 83 Ala. 238, 241; 3 So. 447; 3 Am. St. 715.

[2] Ramsdell v. New York &c. R. Co., 151 Mass. 245; 23 N. E. 1103; 7 L. R. A. 154.

[of damages] may be recovered in not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."

Under a statute providing that injuries to the person shall survive to the personal representative, the plaintiff can recover only such damages as he proves were sustained by the deceased. A conjecture that he suffered mental or other pain is not sufficient. Thus, in Kennedy v. Standard Sugar Refinery (Mass.),[1] the deceased, while engaged in wheeling coal for the defendant, fell from a platform twenty feet to the ground. He immediately became unconscious, and remained so until his death, thirty-six hours afterwards. It was held in an action at common law that his administratrix could not recover damages for the mental or other suffering endured by him during the fall, because there was no proof that he suffered during that time, and that the jury was not warranted in inferring that he suffered.

§ 189. "Assessed with reference to the degree of culpability."—These words indicate that there must be some degree of culpability on the part of the employer, or of the person for whose negligence he is made liable.

The same language is used in section 212 of Massachusetts Public Statutes, chapter 112, relating to the liability of railroad corporations for an injury resulting in death. Under this statute it has been held that a railroad is not liable for the defective condition of the road-bed of a road operated but not owned by it, unless it had notice of the defect, or might have had notice of it by the exercise of due care, because there is no culpability on its part.[2]

[1] 125 Mass. 90; 28 Am. R. 214.

[2] Littlejohn v. Fitchburg R. Co., 148 Mass. 478; 20 N. E. 103.

In reference to a similar statute Mr. Justice Metcalf for the court says in Carey v. Berkshire R. Co. (Mass.)[1]: "And as this penalty is to be recovered by indictment,[2] it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the commonwealth."

Where there is a series of negligent acts, the earlier acts conducing to and furnishing occasion for the later acts, the jury, in determining the degree of culpability of the defendant corporation for causing the death of the intestate, is not confined to a consideration of the act which immediately produced the death, but may consider the whole chain or series of acts and assess damages accordingly.[3]

§ 190. New York rule upon the maximum limit of damages.—The New York Employers' Liability Act of 1902 contains no limitation upon the amount of damages recoverable, either for injuries resulting in death, or otherwise.

With respect to injuries resulting in death the New York constitution of 1894, art. 1, § 18, provides that:

"The right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

It has been held that this constitutional provision has

[1] 1 Cush. (Mass.) 475, 480; 48 Am. D. 616.

[2] The fact that the penalty is recovered by indictment instead of by a civil action seems immaterial upon the question of the measure of damages: Doyle v. Fitchburg R. Co., 162 Mass. 66, 71; 37 N. E. 770.

[3] Kansas City &c. R. Co. v. Sanders, 98 Ala. 293; 13 So. 57.

no retrospective operation, and does not affect causes of action which accrued before it went into effect.[1]

§ 191. In Alabama, damages are limited to the pecuniary loss or injury.—In Alabama the Employers' Liability Act contains no criterion for estimating damages. In case the injury results in death, the damages recovered are "distributed according to the statute of distributions."[2] In such case the supreme court has held that the measure of damages is limited to the pecuniary loss or injury sustained by the person entitled to receive the damages, and that no damages can be recovered on account of the pain and suffering of the deceased, the grief and distress of his family, or the loss of his society.[3] The reason assigned by the court in the first case just cited is as follows: "The theory of the statute is, that those for whom compensation is provided have a pecuniary interest in the life of the person killed, and consequently the amount of the recovery is limited to the value of such interest."[4] In delivering the court's opinion in the same case Mr. Justice Coleman says: "The jury have no arbitrary discretion to give as damages what they may see proper, without reference to a proper basis from which to estimate them. That the jury may have proper data from which a pecuniary compensation may be fixed, it is proper to admit evidence of the age, probable duration of life, habits of industry, means, business, earnings, health, skill of the deceased, reasonable future expectations; and

[1] Isola v. Weber, 147 N. Y. 329; 41 N. E. 704; reargument denied in 148 N. Y. 736; 42 N. E. 723; O'Reilly v. Utah &c. Stage Co., 87 Hun (N. Y.) 406; 34 N. Y. Supp. 358.

[2] Alabama Code 1886, § 2591; Code 1896, § 1751.

[3] Louisville &c. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; James v. Richmond &c. R. Co., 92 Ala. 231; 9 So. 335.

[4] Per Coleman, J., p. 552.

perhaps there are other facts which should exert a just influence in determining the pecuniary damage sustained. In proportion as all the relevant facts and circumstances of decedent's condition are brought before the jury, they will be the better prepared to ascertain correct compensation. If none of the facts and circumstances, except the bare killing and age of decedent, are in evidence, the verdict for other than nominal damages would be purely conjectural."

In the later case of James v. Richmond &c. R. Co. (Ala.),[1] the court mentioned two additional elements of damage; namely, the net income and habits of economy of the deceased, which were said to be important factors in ascertaining his accumulating capacity.[2] In the same case it was held that an administratrix was entitled to recover substantial damages where it appeared in evidence that the deceased was 22 or 23 years of age, of good health, probable duration of life thirty-nine or forty years, occupation a brakeman on a freight-train, average earning capacity $30 or $35 per month.

§ 192. When deceased employee is a minor.—In an action under the Alabama act, for causing the death of a minor employee, his personal representative is not entitled to recover damages for the earnings of the deceased during his minority, when he lived with and was supported by his father prior to his death. Such damages belong to the father, and may be recovered by him in a separate action, and they should, therefore, be excluded by the jury in estimating the damages in an action brought by his executor or administrator.[3]

[1] 92 Ala. 231, 236; 9 So. 335.

[2] See also, Richmond &c. R. Co. v. Hammond, 93 Ala. 181; 9 So. 577.

[3] Alabama Coal Co. v. Pitts, 98 Ala. 285; 13 So. 135; Williams v. South &c. R. Co., 91 Ala. 635; 9 So. 77.

In Horgan v. Pacific Mills (Mass.)[1] the plaintiff's daughter, aged eleven years, was injured while working for the defendant, and the plaintiff as guardian for her daughter received the sum of $2,800 in full settlement and satisfaction of the former suit. In that suit no claim was made for expenses or loss of services, and this present action was brought to recover for the loss of service and for medical expenses, nursing, and others incurred during the incapacity of the daughter. The plaintiff was a widow and kept a small shop in the front room of the tenement in which she lived with several minor children. The lower court found in favor of the plaintiff in this action for the sum of $309.97, and this judgment was affirmed by the supreme court. "The tendency of modern decisions," says Chief Justice Field in delivering the opinion of the court (page 404), "is to give to a widow left with minor children who keeps the family together and supports herself and them with the aid of their services very much the same control over them and their earnings during their minority, and to impose on her to the extent of her ability much the same civil responsibility for their education and maintenance, as are given to and imposed on a father. We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant.[2] Of course there should not be a double

[1] 158 Mass. 402; 33 N. E. 581.

[2] Citing Inhabitants &c. v. Inhabitants &c., 16 Mass. 135; Hammond v. Corbett, 50 N. H. 501; 9 Am. R. 288; Matthewson v. Perry, 37 Conn. 435; 9 Am. R. 339; Dumain v. Gwynne, 10 Allen (Mass.) 270; Cam-

recovery, but if the expenses are not incurred on the credit of the child, but on that of the mother, and if the child, while living with the mother, is not entitled to its own earnings, so that the loss of service is not the child's loss, but the mother's, these items of damage should not be included in the damages recovered by the child, but in those recovered by the mother."[1]

In Indiana it has been decided that where damages for the loss of a child's future services during minority are claimed in the complaint, the measure of damages is the value of the child's services from the time of the death until majority, taken in connection with his prospects in life, less the cost of his support and maintenance during that period, including board, clothing, schooling and medical attendance.[2] In this case the jury returned a verdict for $599.95 for the death of plaintiff's son, aged seven years and three months, and the court refused to set it aside as excessive.

The fact that a mother dying when her child is seven days old gives it to the grandmother, who takes charge of it and supports it with the father's consent until its death by the defendant's wrongful act, does not constitute such an abandonment or emancipation of the child as to bar an action by the father. "Human beings," says the

erlin v. Palmer Co., 10 Allen (Mass.) 539; Baldwin v. Foster, 138 Mass. 449; Gleason v. City of Boston, 144 Mass. 25; 10 N. E. 476; Connell v. Putnam, 58 N. H. 534; Whitaker v. Warren, 60 N. H. 20; 49 Am. R. 302; County Com'rs v. Hamilton, 60 Md. 340; 45 Am. R. 739; Natchez &c. R. Co. v. Cook, 63 Miss. 38.

[1] Citing M'Carthy v. Guild, 12 Met. (Mass.) 291; Dennis v. Clark, 2 Cush. (Mass.) 347; 48 Am. D. 671; Wilton v. Middlesex R. Co., 125 Mass. 130.

[2] City of Elwood v. Addison, 26 Ind. App. 28; 59 N. E. 47 (1901); Louisville &c. R. Co. v. Rush, 127 Ind. 545; 26 N. E. 1010 (1890); Pennsylvania Co. v. Lilly, 73 Ind. 252. See also, Ihl v. Forty-second St. R. Co., 47 N. Y. 317; 7 Am. R. 450 ($1,800 verdict sustained for death of three-year-old child); 2 Thompson Neg. (1st ed.) 1290.

court, "are not subjects of gift, as chattels personal, and neither a natural father nor mother could give their child to another."[1]

§ 193. Age, health, strength, capacity to earn money, and family of deceased, as elements of damage.—In Baltimore &c. R. Co. v. Mackey[2] an inspector and repairer of cars, in the employ of the defendant railroad company, was killed by its negligence in the District of Columbia. The act of congress, approved February 17, 1885, chapter 126,[3] provided that the damages not exceeding $10,000 for such death, "shall be assessed with reference to the injury resulting from such act, neglect, or default, causing such death, to the widow and next of kin of such deceased person;" and further provided, by section 3, "that the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distributions in force in the said District of Columbia." In delivering the opinion of the court, Mr. Justice Harlan says, on page 93: "Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to

[1] Elwood &c. St. R. Co. v. Ross, 26 Ind. App. 258, 271; 58 N. E. 535, per Wiley, J.; citing Citizens' St. R. Co. v. Cooper, 22 Ind. App. 459; 53 N. E. 1092; 72 Am. St. 319.

[2] 157 U. S. 72; 15 S. Ct. 491.

[3] 23 U. S. Stats. at Large 307.

maintain themselves, and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance." The case was distinguished from that of Pennsylvania Co. v. Roy,[1] in which a person was injured but not killed, and in which it was held that his poverty, and the number and ages of his children, were not proper elements of damage.

The probable increase in the future earning capacity of a young man is a proper element of damages under the Employers' Liability Act. In Louisville &c. R. Co. v. Graham (Ky.),[2] the plaintiff's intestate lost his life in Alabama, while in the defendant's employ, and this action was brought in Kentucky under the Alabama act. It was held, the deceased having been a young man at the time of his death, that the jury were warranted in allowing for an increase in his future earning capacity, instead of basing the verdict upon his present earning capacity.

In Farmers' Loan Co. v. Toledo &c. R. Co.,[3] "the increased earning capacity that would come with additional experience" was recognized by the special master as a proper element of damage in the case of an employee of the age of thirty years who was killed through the defendant's negligence. Although Ricks, J., reduced the master's finding from $11,606 to $10,000, he did it for the reason that the legislatures of a large number of states have fixed $10,000 as the maximum limit in case of death by wrongful act, and not on the ground that an employee's probable increase in earning capacity was an improper element of damage.

[1] 102 U. S. 451.

[2] 98 Ky. 688; 34 S. W. 229.

[3] 67 Fed. 73.

In Louisville &c. R. Co. v. Morgan (Ala.)[1] it was ruled that the amount of monthly savings of a deceased employee is a proper element of damages in an action brought for the benefit of his next of kin under the Alabama Employers' Liability Act; and it was also decided that the money expended by a deceased employee on his young brother, who is a distributee of his estate, may be shown in an action under the Alabama Employers' Liability Act.

The average monthly earnings of the injured person may be shown, because it is a part of the plaintiff's damage that he is incapacitated for work by the defendant's negligence. "To ascertain the economic value of what he is deprived of, there seems to be no better help than to take his average earnings in the past, subject perhaps to the cautions to be found in the English cases."[2]

If the wages of an injured employee are paid by his employer while he is unable to work by reason of the accident, in an action against a third person he can not recover damages for loss of wages.[3]

§ 194. When the deceased leaves a widow or dependent next of kin—Apportionment of damages.—If the employee's death was not instantaneous, but was preceded

[1] 114 Ala. 449; 22 So. 20 (1897).

[2] Murdock v. New York &c. Ex. Co., 167 Mass. 549, 550; 46 N. E. 57, per Holmes, J.; citing Phillips v. London &c. R. Co., 5 C. P. D. 280, 286, 290; 5 Q. B. D. 78, 81, 87; 4 Q. B. D. 406, 408; Armsworth v. Southeastern R. Co., 11 Jur. (pt. 1) 758, 760, ad fin.; Ehrgott v. Mayor &c., 96 N. Y. 264, 275, 276; 48 Am. R. 622; New Jersey Ex. Co. v. Nichols, 33 N. J. L. 434, 437; 97 Am. D. 722; Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Welch v. Ware, 32 Mich. 77, 81; Parshall v. Minneapolis &c. R. Co., 35 Fed. 649, 651; McNamara v. Clintonville, 62 Wis. 207, 210; 22 N. W. 472; 51 Am. R. 722; Collins v. Dodge, 37 Minn. 503; 35 N. W. 368; Myhan v. Louisiana &c. Co., 41 La. An. 964, 969; 6 So. 799; 17 Am. St. 436; 7 L. R. A. 172. See Ballou v. Farnum, 11 Allen (Mass.) 73, 79.

[3] Drinkwater v. Dinsmore, 80 N. Y. 390; 36 Am. R. 624 (1880).

by conscious suffering, and he leaves a widow or dependent next of kin, his legal representative, under the Massachusetts act as amended, may recover damages, not exceeding $5,000, both for his pain and suffering, and also for the death itself as a substantive cause of action. The jury is empowered in such an action by the executor or administrator to apportion the damages between him and the widow or dependent next of kin; and it is further provided that "the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable."[1]

If the employee is instantly killed, or dies without conscious suffering, his widow or dependent next of kin, under the Massachusetts statute, may recover damages "in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered."[2]

In Louisville &c. R. Co. v. Trammell (Ala)[3] the court, by Mr. Justice McClellan, says on page 354: "The measure of damages, in all cases where suit is for injuries causing the death of an employee, is the pecuniary value of the life of the employee to his next of kin, resulting either from a relation of dependency, or from expectation of benefit from the distribution of such estate as it may be inferred from the evidence he would have earned and saved but for untimely death." In the same case it appeared that the probable duration of life of the deceased was twenty-seven years; that his earning capacity was $300 per year; that he saved nothing; and that he left a widow only and no children. It was held that the measure of damages was such a sum as, if put at legal inter-

[1] Mass. St. 1892, ch. 260, § 1; Rev. Laws 1902, ch. 106, § 74.
[2] Mass. St. 1887, ch. 270, § 2.
[3] 93 Ala. 350; 9 So. 870.

est, would yield the widow an annual income of $150 for twenty-seven years, and exhaust the principal at the end of that period. This sum the court determined to be approximately $1,650; and the case having been tried without a jury in the lower court, the supreme court, under its power to render such judgment as the trial court should have rendered, reduced the judgment from $2,500 to $1,650.

In Bromley v. Birmingham &c. R. Co. (Ala.)[1] it was held that the fact that the deceased employee left surviving him a wife and minor child dependent upon him for support, without proof that he expended his earnings wholly or in part upon them or for their benefit, can not affect the measure of damages or strengthen the right of recovery. "Where the relation of dependency exists, and the proof shows expenditure for their benefit, the measure of recovery as affected by this proof is declared in the case of Louisville &c. R. Co. v. Trammell (Ala.).[2] If the income exceed the outlay, so that there is a regular accumulation in excess of consumption, the rule is declared in McAdory v. Louisville &c. R. Co. (Ala.)."[3]

The elements of damages sustained by an employee's next of kin in an action brought under the Employers' Liability Act, are not defined by the statute itself in Indiana. A more liberal construction has been given to this act by the courts of Indiana than has been given to some similar acts by the courts of other states.

When the deceased employee leaves a widow and children, they are entitled to recover damages, not only for the probable earnings of the deceased, but also for the value of his personal services in the superintendence and

[1] 95 Ala. 397; 11 So. 341.
[2] 93 Ala. 350; 9 So. 870.
[3] 94 Ala. 272; 10 So. 507; per Coleman, J., for the court, in Bromley v. Birmingham &c. R. Co., supra, at p. 406.

care of his family, and the education of his children, and the performance of such acts of paternal assistance as the law imposed upon him and which the children might reasonably expect.[1]

In Chicago &c. R. Co. v. Thomas (Ind.),[2] the court by Chief Justice Dowling said that there was a legal presumption that both the widow and the infant son of a person killed by the defendant's wrongful act were entitled to the services of the deceased, and that such services were valuable to both; and it was accordingly held that the complaint was good on demurrer, although it did not aver that actual damages were sustained by the death of such husband and father.

When money is paid to the personal representative without a trial or verdict, a court of equity will apportion the fund among the parties entitled to it in like manner as a jury could have done if there had been a jury trial.[3]

§ 195. When the deceased leaves no widow or dependent next of kin.—In Massachusetts, if there was conscious suffering on the part of the deceased employee, and he leaves no widow or dependent next of kin, no damages for the death itself can be recovered under the Employers' Liability Act;[4] but the executor or administrator may recover damages for his mental and physical suffering, as assets of the estate.[5]

If the death was instantaneous, or without conscious suffering, the measure of damages is "not less than five hundred and not more than five thousand dollars, to be assessed with reference to the degree of culpability of the

[1] Hunt v. Conner, 26 Ind. App. 41; 59 N. E. 50 (1901).
[2] 155 Ind. 634; 55 N. E. 861 (1900).
[3] Bulmer v. Bulmer, 25 Ch. D. 409 (under Ld. Campbell's act).
[4] Mass. St. 1892, ch. 260, § 1.
[5] Ramsdell v. New York &c. R. Co., 151 Mass. 245; 23 N. E. 1103; 7 L. R. A. 154.

employer herein, or the person for whose negligence he is made liable.'"[1]

In Alabama, where the deceased employee leaves no next of kin entitled to inherit under the statute of distributions, only nominal damages can be recovered under the Employers' Liability Act. In a suit by the personal representative, however, he need not allege or prove that the deceased left next of kin, as the want of next of kin is merely matter of defense.[2]

In the case of McAdory v. Louisville &c. R. Co. (Ala.),[3] there were net earnings, or savings, but no relation of dependence. The deceased was a switchman on a railroad, at a monthly salary of $66.66; age, 21 years; unmarried; sober and healthy, and of industrious and economical habits; expectancy of life, about forty years. It was held, in an action by his personal representative under the Employers' Liability Act, that the true measure of damages was not the aggregate amount of his net earnings during the probable duration of his life, estimated on the basis of his health, ability to labor, habits of sobriety, industry, and economy, gross annual earnings and expenditures, but such a sum as, estimated on that basis, with legal interest added, would aggregate that amount, calculated by the American mortuary tables. A verdict for the plaintiff for $9,395.95 having been set aside by the trial judge as excessive, the supreme court held that such action was proper and affirmed the judgment, without attempting to fix the amount of damages, as it might have done if the trial had been without a jury.[4] The rule announced by the supreme court of Texas, in Houston

[1] Mass. St. 1892, ch. 260, § 2; Rev. Laws 1902, ch. 106, § 74.
[2] James v. Richmond &c. R. Co., 92 Ala. 231; 9 So. 335.
[3] 94 Ala. 272; 10 So. 507.
[4] Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870.

&c. R. Co. v. Cowser,[1] is quoted with approval on page 276; namely: "Perhaps the nearest measure of damages approximating this reasonable certainty would be such sum as would purchase an annuity if such security was in the market, equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances of the particular case reasonably accessible in evidence, and including the probable duration of life, as shown by the approved tables."

In an action under the Alabama Employers' Liability Act, it was held that the fact that the deceased employee was suffering from pulmonary disease at the time of his injury is admissible in evidence for the defendant, as affecting his probable continuance in life.[2]

§ 196. Colorado rules.—In an action under the Colorado act of 1877, giving a right of action for death caused by negligence, the measure of damages has been thus described by the supreme court of Colorado in Pierce v. Conners:[3] "The true measure of compensatory relief in actions of this kind, under the act of 1877, supra, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of the defendant. Such sum will depend on a variety of circumstances and future contingencies, and will therefore be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated by considering the age, health, condition in life, habits of industry or otherwise, ability to earn money, on the part of the deceased, including his or

[1] 57 Tex. 293, 304.

[2] Columbus &c. R. Co. v. Bridges, 86 Ala. 448; 5 So. 864; 11 Am. St. 58.

[3] 20 Colo. 178, 182; 37 Pac. 721, 722; 46 Am. St. 279.

her disposition to aid or assist the plaintiff. Not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them, as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts, may be taken into consideration."[1]

§ 197. Other cases.—For other cases involving the measure of damages for injuries resulting in death, in actions brought under the American acts, of which Lord Campbell's act is the prototype, see the cases cited in the note.[2]

§ 198. Exemplary or punitive damages.—In Alabama it has been decided, in an action under its Employers' Liability Act, that such damages are not recoverable where the injury results in death.[3] The statute does not limit the amount of damages recoverable, and the measure of damages is determined upon common-law principles. Even when the negligence of the defendant or of his employees is so gross or wanton as to overcome the defense of contributory negligence, no damages beyond the point of compensation can be recovered by the personal representative.[4]

Whether a like rule applies when the injury does not result in death, and the injured employee himself brings the action, seems to be doubtful.[5] In a case at common

[1] See also, Moffatt v. Tenney, 17 Colo. 189; 30 Pac. 348; Hayes v. Williams, 17 Colo. 465, 468; 30 Pac. 352; Denver &c. R. Co. v. Wilson, 12 Colo. 20; 20 Pac. 340.

[2] Railroad Co. v. Barron, 5 Wall. 90; Chicago &c. R. Co. v. Harwood, 80 Ill. 88; Huntingdon &c. R. Co. v. Decker, 84 Pa. 419; Kesler v. Smith, 66 N. C. 154; Telfer v. Northern R. Co., 30 N. J. L. 188.

[3] Louisville &c. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; Columbus &c. R. Co. v. Bridges, 86 Ala. 448; 5 So. 864; 11 Am. St. 58.

[4] Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870.

[5] Seaboard Mfg. Co. v. Woodson, 98 Ala. 378; 11 So. 733.

law decided in 1879 it was held that exemplary or punitive damages were recoverable for personal injuries caused by negligence, if the negligence was gross; and that the degree of negligence is a question for the jury to determine, under proper instructions from the court.[1]

In Indiana it has been held that punitive damages can not be given for an injury to an employee caused by negligence without wilfulness.[2]

In Massachusetts exemplary and vindictive damages are probably not recoverable.[3]

In Connecticut it has been held, in an action under a statute resembling Lord Campbell's act, that such damages are recoverable.[4]

§ 199. Excessive damages and how reduced.—Under the Massachusetts practice, the presiding judge, when the damages awarded by the jury appear to him to be excessive, "may either grant a new trial absolutely, or give the plaintiff the option to remit the excess, or a portion thereof, and order the verdict to stand for the residue."[5] A like rule prevails in Alabama and generally elsewhere.[6]

A verdict of $5,000 is not excessive where the employee at the time of his injury was forty-seven years old and earning fifty dollars a month, and suffered a painful

[1] South &c. R. Co. v. McLendon, 63 Ala. 266. See also, Barbour Co. v. Horn, 48 Ala. 566; Mobile &c. R. Co. v. Ashcraft, 48 Ala. 15.

[2] Linton Coal &c. Co. v. Persons, 15 Ind. App. 69; 43 N. E. 651 (1895).

[3] Higgins v. Central &c. R. Co., 155 Mass. 176, 181; 29 N. E. 534; 31 Am. St. 544; Barnard v. Poor, 21 Pick. (Mass.) 378; Austin v. Wilson, 4 Cush. (Mass.) 273; 50 Am. D. 766.

[4] Linsley v. Bushnell, 15 Conn. 225; 38 Am. D. 79; Beecher v. Derby Bridge Co., 24 Conn. 491, 497; Murphy v. New York &c. R. Co., 29 Conn. 496.

[5] Doyle v. Dixon, 97 Mass. 208, 213; 93 Am. D. 80, per Gray, J.; Lambert v. Craig, 12 Pick. (Mass.) 199; Blunt v. Little, 3 Mason 102, 107.

[6] Stephenson v. Mansony, 4 Ala. 317.

fracture of the ankle, which his physician testified would probably result in a permanent disability.[1]

When the trial is without a jury, the supreme court of Alabama sitting in banc has the power to reduce the damages found by the trial judge, if they appear to be excessive, and to enter judgment for the reduced amount without granting a new trial, and without a remittitur by the plaintiff.[2]

In an action under the Alabama Employers' Liability Act it was held that a verdict of $10,500 was not excessive, where it appeared that the plaintiff was a flagman in the defendant's employ, earning fifty dollars a month; that he was seriously and permanently injured, and that he was twenty-five years old and in good health at the time of the accident.[3]

In Commercial Club v. Hilliker (Ind.)[4] a married woman, while living with and supported by her husband, was killed by the wrongful act of the defendant. She worked out and contributed $2.50 per week from her earnings toward the support of the plaintiff, her mother. It was held that a verdict of $2,750 was excessive, and that under this statute damages can not be recovered for the plaintiff's bereavement, or by way of solatium, but must be limited to the pecuniary loss sustained.[5]

In Denver &c. R. Co. v. Spencer (Colo.)[6] it was held that a verdict for $4,000 for the negligent killing of the plaintiff's father, who was sixty-eight years old, and

[1] Richmond &c. R. Co. v. Farmer, 97 Ala. 141; 12 So. 86.

[2] Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870.

[3] Alabama &c. R. Co. v. Bailey, 112 Ala. 167; 20 So. 313 (1896).

[4] 20 Ind. App. 239; 50 N. E. 578.

[5] See also, Louisville &c. R. Co. v. Wright, 134 Ind. 509; 34 N. E. 314; Diebold v. Sharp, 19 Ind. App. 474; 49 N. E. 837; Armour v. Czischki, 59 Ill. App. 17; Rose v. Des Moines &c. R. Co., 39 Iowa 246; St. Louis &c. R. Co. v. Robbins, 57 Ark. 377; 21 S. W. 886.

[6] 27 Colo. 313; 61 Pac. 606 (1900).

whose annual earnings were about $1,000 above his personal expenses, and left no children dependent upon him for support, was excessive.

A verdict for $15,000 is not excessive where the plaintiff was a laborer, thirty-five years old, strong and able-bodied, and his injuries are likely to be of a permanent character, wholly disabling him from labor.[1] The plaintiff is entitled to compensation for pain and suffering, for expenses of cure, for value of time lost, and for a fair allowance for permanent disability and diminution of power to earn money.

§ 200. Division of damages when employee's negligence has contributed to his injury.—In the admiralty courts, where an employee is injured on board ship through a marine tort arising partly from the negligence of the ship's officers and partly from his own negligence, the fact that his own negligence contributed to his injury does not prevent a recovery,—it only causes a division of damages and a reduction in the amount recoverable.[2]

In the common-law courts, however, contributory negligence on the part of an employee will prevent a recovery of any damages, even when the injury occurred on board ship partly through the negligence of its officers.[3] But the mere fact that the plaintiff aggravates his injury after it is received by his negligent conduct will not prevent

[1] Solarz v. Manhattan R. Co., 155 N. Y. 645; 49 N. E. 1104; 8 Misc. (N. Y.) 656; 11 Misc. (N. Y.) 715 (1898). See also, Rockwell v. Third Ave. &c. R. Co., 64 Barb. (N. Y.) 438; 53 N. Y. 625 (sustaining verdict for $12,000); Gale v. New York &c. R. Co., 76 N. Y. 594; 13 Hun (N. Y.) 1 (sustaining verdict for $14,000); Schultz v. Third Ave. &c. R. Co., 89 N. Y. 242; 46 N. Y. Super. Ct. 211 (judgment on verdict for $15,000 reversed on other grounds, not because it was excessive).

[2] The Max Morris, 137 U. S. 1; 11 S. Ct. 29; The Julia Fowler, 49 Fed. 277.

[3] Kalleck v. Deering, 161 Mass. 469, 472; 37 N. E. 450; 42 Am. St. 421. That contributory negligence prevents a recovery under the Employers' Liability Acts, see §§ 151–161, ante.

him from recovering for the original injury inflicted by the defendant's negligence.[1]

§ 201. Remote or conjectural damages.—Under the Alabama statute for the death of a minor employee, it has been decided that the probability of his marrying and having children, if he had lived, is too remote and conjectural to be considered by the jury in estimating the amount of recovery.[2]

§ 202. Injury to married woman.—Nearly all the states now have married women's property acts which have greatly changed the common-law rights of the husband in his wife's property and the husband's rights to maintain an action for personal injuries to his wife. At common law it was well settled in England as well as in the different states of the Union that the husband could maintain an action in his own name alone for an injury caused by an assault and battery upon his wife, or by medical or surgical malpractice, or by any other form of negligence.[3]

Even under the recent married women's property acts the husband still possesses the right to recover in his own name for the loss of the consortium of his wife arising from personal injuries occasioned to her by the defend-

[1] Hibbard v. Thompson, 109 Mass. 286; Owens v. Baltimore &c. R. Co., 35 Fed. 715; 1 L. R. A. 75; Gould v. McKenna, 86 Pa. St. 297; 27 Am. R. 705; Hathorn v. Richmond, 48 Vt. 557.

[2] Tennessee &c. Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[3] Russell v. Corne, 2 Ld. Raym. 1031; Smith v. Hixon, 2 Strange 977; Carey v. Berkshire R. Co., 1 Cush. (Mass.) 475, 478; 48 Am. D. 616; Barnes v. Hurd, 11 Mass. 59; Lewis v. Babcock, 18 Johns. (N. Y.) 443; Matteson v. New York Cent. R. Co., 35 N. Y. 487; 91 Am. D. 67; Laughlin v. Eaton, 54 Me. 156; Hopkins v. Atlantic &c. R. Co., 36 N. H. 9, 14; 72 Am. D. 287; Hyatt v. Adams, 16 Mich. 180; Long v. Morrison, 14 Ind. 595; 77 Am. D. 72; Nixon v. Ludlam, 50 Ill. App. 273; Mowry v. Chaney, 43 Iowa 609; Smith v. St. Joseph, 55 Mo. 456; 17 Am. R. 660.

ant's negligence, although another action has been brought by the wife against the defendant for the same accident. Consortium has been defined as fellowship, or society or communion, and this is a right which a husband possesses in his own name and for his own benefit, and of which he has not been deprived by the modern statutes.

In delivering the opinion of the court in Kelley v. New York &c. R. Co. (Mass.),[1] Mr. Justice Allen said upon this subject: "The contention of the defendant, therefore, must rest entirely on the ground that the husband has lost his right of consortium by reason of the legislation of this commonwealth increasing the rights of married women.[2] But there has been no substantial change in the statutes upon this subject since the decision in Bigaouette v. Paulet (Mass.).[3] Notwithstanding the progress of legislation in giving to married women the control of their time and actions, this right of the husband is not destroyed. The unity and identity of interest which by the common law existed between husband and wife have been impaired.[4] They are not, however, entirely done away with. The husband's right to compel his wife to work for him is abridged, but he still has a right to her society and assistance, which is different in character and degree from that which other people have, or which she is at liberty to give to them. By marriage, both husband and wife take upon themselves certain duties and obligations towards each other, in sickness and health, which it can not be supposed that the legislature has intended wholly to up-

[1] 168 Mass. 308, 311; 46 N. E. 1063; 38 L. R. A. 631.

[2] Citing Harmon v. Old Colony R. Co., 165 Mass. 100; 42 N. E. 505; 52 Am. St. 499; 30 L. R. A. 658.

[3] 134 Mass. 123; 45 Am. R. 307.

[4] Citing Butler v. Ives, 139 Mass. 202; 29 N. E. 654.

root. A married woman may now perform any labor or services on her sole and separate account, as her husband may; nevertheless, each owes certain duties to the other which are not annulled by the statutes.[1] These duties are included in the word 'consortium;' but the extent of these duties, or of the right of consortium, need not now be determined."

In New York it has been held that the husband and not the wife was the proper one to recover for loss of services in the discharge of household duties and other services rendered by her to her husband;[2] and further, that unless the wife was actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit and which she had lost by reason of the injury, she had not sustained any consequential damages and could not maintain an action in her own name.[3]

In Brooks v. Schwerin (N. Y.),[4] on the other hand, there was evidence that the plaintiff took care of her family, and that she worked out by the day and earned about 10 shillings a day. It was held by the court of appeals that so far as the wife was disabled to earn money by such outside work, the loss was hers and the jury had the right to take it into account in estimating her damages in an action brought in her name.[5]

In Bennett v. Bennett (N. Y.)[6] it was held that the basis of the husband's action for the loss of consortium is his right to the conjugal society of his wife, and that it is

[1] Citing Mewhirter v. Hatten, 42 Iowa 288; 20 Am. R. 618.
[2] Blaechinska v. Howard Mission &c., 130 N. Y. 497; 29 N. E. 755.
[3] Filer v. New York Cent. R. Co., 49 N. Y. 47; 10 Am. R. 327.
[4] 54 N. Y. 343.
[5] See also, Texas &c. R. Co. v. Humble, 181 U. S. 57; 21 S. Ct. 526 (1901).
[6] 116 N. Y. 584; 23 N. E. 17; 6 L. R. A. 553.

not necessary that there should be proof of any pecuniary loss or loss of service by reason of the defendant's act.

The right of a wife to recover damages for a personal injury which results in an impairment of her capacity to perform labor and to carry on business under the recent statutes is fully discussed by the supreme judicial court of Massachusetts in Harmon v. Old Colony R. Co.,[1] and by the supreme court of the United States in Texas &c. R. Co. v. Humble.[2] In both of these cases it was held that the wife's right was exclusive of the husband's right as the result of the various married women's acts in the two states in question, and that she could maintain an action in her own name and for her own benefit and recover damages for such loss of capacity to earn money occasioned by the negligence of the defendant. It is not necessary that the wife should actually have been engaged in work or business at the precise time of the accident, and it is sufficient that she had been so engaged for a substantial period shortly before the accident. Thus in Texas &c. R. Co. v. Humble,[3] it appeared that before the plaintiff was injured she had been engaged for some years in business on her own account in the state of Arkansas, supporting herself and her children, but that she had discontinued such business for a few months, and after renewing it had given it up on account of temporary illness when the injuries sustained incapacitated her for further work. The defendant asked the court at the trial to rule that the plaintiff could not recover for diminished capacity to labor because there was no evidence showing capacity to earn money at or just before she was injured. The court held that this request was properly refused because it pinned the evidence of capacity down to the very

[1] 165 Mass. 100; 42 N. E. 505; 52 Am. St. 499; 30 L. R. A. 659.
[2] 181 U. S. 57; 21 S. Ct. 526 (1901).
[3] 181 U. S. 57; 21 S. Ct. 526 (1901).

point of time when the injury was inflicted to the plaintiff and was refining too much upon the principle involved. "This loss of ability," said Chief Justice Fuller on page 67, "to make earnings outside the discharge of household duties and irrespective of her husband was, under the statute of Arkansas, her loss, and not her husband's, and the mere fact that at the moment of the injury she happened to be out of business should not deprive her of the benefit of the rule which would have been otherwise applicable according to Filer v. Railroad Co.[1] and Brooks v. Schwerin."[2]

In Harmon v. Old Colony R. Co. (Mass),[3] the plaintiff was doing business as a restaurant-keeper under a married woman's certificate to do business on her own account at and for several years previous to her injury. It was held that she was entitled to show how much damage she had sustained in this business growing out of inability to look after and take care of the business.

§ 203. Money received from insurance company by employee as mitigation of damages.—The Massachusetts and New York Employers' Liability Acts expressly declare that in certain cases if the injured employee has received money from any relief society to which the employer has contributed money as an insurance fund for the purpose of indemnifying his employees for personal injuries received in the service, the employer may prove, in an action under the Employers' Liability Act, in mitigation of the damages recoverable by the employee, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer as the contribution

[1] 49 N. Y. 47; 10 Am. R. 327.
[2] 54 N. Y. 343.
[3] 165 Mass. 100; 42 N. E. 505; 52 Am. St. 499; 30 L. R. A. 659.

of such employer to such fund or society bears to the whole contribution thereto.[1]

Where the employer has not contributed to any such fund or society, and in the absence of any such statute, it has been generally decided that money received by an injured employee from an insurance company can not be proved in mitigation of the damages recoverable against the employer, and the employer is liable for the whole amount of the damage.[2]

But if the employer pays the wages of his employee while he is unable to work by reason of the accident, the injured employee can not recover as an element of damage his loss of wages or loss of time.

§ 203a. Fright without personal contact.—In some states it has been ruled that no damages can be recovered for fright, terror, alarm, anxiety or distress of mind caused by unintentional negligence, unless they are accompanied by some physical injury;[4] the damages are considered too remote. A contrary rule, however, prevails in other jurisdictions.[5]

[1] Mass. St. 1887, ch. 270, § 6; Rev. Laws 1902, ch. 106, § 78; N. Y. St. 1902, ch. 600, § 4.

[2] Althorf v. Wolfe, 22 N. Y. 355 (1860); Harding v. Town of Townshend, 43 Vt. 536; 5 Am. R. 304 (1871); Propeller Monticello v. Mollison, 17 How. (U. S.) 152; Missouri &c. R. Co. v. Rains (Tex. Civ. App.), 40 S. W. 635 (1897); Clark v. Inhabitants &c., 2 B. & C. 254.

[3] Drinkwater v. Dinsmore, 80 N. Y. 390; 36 Am. R. 624 (1880).

[4] Spade v. Lynn &c. R. Co., 168 Mass. 285; 47 N. E. 88 (1897); 172 Mass. 488; 52 N. E. 747 (1899); Berard v. Boston &c. R. Co., 177 Mass. 179; 58 N. E. 586 (1900); Mitchell v. Rochester R. Co., 151 N. Y. 107; 45 N. E. 354 (1896); Ewing v. Pittsburgh &c. R. Co., 147 Pa. St. 40; 23 Atl. 340 (1892); Buchanan v. West Jersey R. Co., 52 N. J. L. 265; 19 Atl. 254 (1890); Victoria Railways Com'rs v. Coultas, 13 App. Cas. 222.

[5] Purcell v. St. Paul City R. Co., 48 Minn. 134; 50 N. W. 1034; Fitzpatrick v. Great Western R. Co., 12 Up. Can. Q. B. 645.

CHAPTER XIII.

DIRECTING A NONSUIT OR VERDICT FOR DEFENDANT.

I. Defendant's Negligence.

SECTION

204. Subdivisions of subject and preliminary remarks.
205. Is mere happening of accident prima facie evidence of negligence? (1) Actions by non-employees at common law.
206. Same—(2) Common-law rule in actions by employees.
207. Slight evidence sufficient, but not mere scintilla.
208. Automatic starting of machinery.
209. Inference against defendant when he introduces no evidence.
210. What amounts to a "defensive explanation" of the injury.
211. Actions under Employers' Liability Acts—Subdivisions of subject.
212. (a) Defects in the ways, works, machinery, or plant.
213. Same.
214. (b) Negligence of a superintendent.
215. Same.
216. (c) Negligence of a person in charge or control of any signal, switch, locomotive-engine, or train upon a railroad.
217. Same.

§ 204. Subdivisions of subject and preliminary remarks.—One of the most difficult questions relating to suits under Employers' Liability Acts is, What evidence is or is not sufficient to entitle the plaintiff to go to the jury? or, in other words, What evidence will or will not authorize the trial judge in nonsuiting the plaintiff, or in directing the jury to return a verdict for the defendant? This question will be discussed under the following subdivisions:

I. Defendant's negligence.
II. Plaintiff's contributory negligence.[1]
III. Assumption of risk, and Volenti non fit injuria.[2]

In Gardner v. Michigan Central R. Co.,[3] Mr. Chief Justice Fuller, speaking for the court, says: "The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."[4]

"It is not a question of the weight of evidence, or whether the verdict ought not to be set aside on a motion for a new trial. When the question is raised by exceptions, the only inquiry is whether there is any evidence proper to submit to the jury as having a tendency to support the legal propositions which charge the defendant with liability."[5] "The first inquiry is whether there was any evidence on behalf of the plaintiff upon which the jury could legally have found a verdict in his favor. If there was, the question of its weight or value can not be considered by us."[6]

"Every one is aware that, among the many suits

[1] Ch. 14, §§ 219–224, post.
[2] Ch. 15, §§ 225–249, post.
[3] 150 U. S. 349, 361; 14 S. Ct. 140.
[4] See also, Baltimore &c. R. Co. v. Mackey, 157 U. S. 72; 15 S. Ct. 491; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 417; 12 S. Ct. 679, and cases cited; Hall v. Posey, 79 Ala. 84; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; Gaynor v. Old Colony R. Co., 100 Mass. 208, 212; 97 Am. D. 96; Marietta &c. R. Co. v. Picksley, 24 Ohio St. 654; Jamison v. San José &c. R. Co., 55 Cal. 593.
[5] Ford v. Fitchburg R. Co., 110 Mass. 240, 260; 14 Am. R. 598, per Colt, J., for the court; citing Forsyth v. Hooper, 11 Allen (Mass.) 419.
[6] Taylor v. Carew Mfg. Co., 140 Mass. 150, 151; 3 N. E. 21, per Devens, J.; citing Heywood v. Stiles, 124 Mass. 275.

brought to recover for personal injuries, there are cases, of which we do not intimate that the present one is an instance, in which unjust claims are sought to be sustained by testimony which, if not wholly false or manufactured, is so colored and distorted as to tend to mislead juries and judges, and to pervert justice. Yet the plaintiff in such a suit has the right to have his alleged cause of action determined by a jury, if upon any reasonable view of the conflicting evidence it can be fairly found as a fact that he was hurt while in the exercise of due care, and by the defendant's fault. If in any jury trial there seems to be danger that the jury will give an unjust verdict upon evidence which in law ought to be submitted to its decision, the proper course is to take the verdict, and then to set it aside as against the evidence or the weight of the evidence, rather than to order a verdict. There is no justification for the latter course in a suit in which it does not appear that any wrong verdict has ever been taken. In the present case, therefore, the question for us is whether, upon any fair view of the reported evidence, there might have been a finding for the plaintiff upon either count of his declaration. Of course in dealing with the evidence the jury could find to be true any statement testified to by a witness, although disbelieving some or all of the other statements made by the same witness. Examining the evidence with this rule in mind it is plain that the jury could find from it that the plaintiff, when he came in contact with the car, was neither playing tag in the street nor attempting to steal a ride."[1]

In Louisville &c. R. Co. v. Allen (Ala.),[2] Mr. Justice Somerville, in delivering the opinion, says: "The question of negligence is one of fact for the determination of

[1] Aiken v. Holyoke St. R. Co., 180 Mass. 8; 61 N. E. 557 (1901), per Barker, J.

[2] 78 Ala. 494, 502.

the jury in cases of doubt, either where the facts are disputed or where different minds may reasonably draw different inferences or conclusions. It is a question of law, however, to be decided by the court, where the facts are undisputed and the inference to be drawn from them is clear and certain.[1] The court will, accordingly, give a general charge on the evidence when requested, where the evidence bearing on the question of negligence vel non is such as that the court would feel authorized to sustain a demurrer to it."[2]

Where the evidence is conflicting, the circumstance that the presiding justice is clearly of the belief that the question should be decided in one way does not justify him in directing a verdict for the party in whose favor that belief operates, though it would justify him in granting a new trial if the jury found for the other party.[3]

The circumstance that the facts of the case are undisputed is not always sufficient to justify the presiding judge in withdrawing the case from the jury and directing a verdict for one of the parties. In an action for negligence causing personal injury, the question whether either or both of the parties are at fault is for the jury, unless the general knowledge and experience of men at once condemn the conduct of one of them as careless, or there is no evidence of negligence.[4]

An instruction that an employer should use such care toward his employees as an ordinarily prudent person would exercise for his own safety and for "the safety of those nearest and dearest to him," is erroneous, and imposes a higher test of care than the law requires.[5]

[1] Citing City Council &c. v. Wright, 72 Ala. 411; 47 Am. R. 422.

[2] Citing Smoot v. Mobile &c. R. Co., 67 Ala. 13.

[3] Chambliss v. Mary Lee Coal &c. Co., 104 Ala. 655; 16 So. 572.

[4] Kerrigan v. West End St. R. Co., 158 Mass. 305; 33 N. E. 523; Lane v. Atlantic Works, 107 Mass. 104.

[5] Last Chance Mining &c. Co. v. Ames, 23 Colo. 167; 47 Pac. 382 (1896).

§ 205. Is mere happening of accident prima facie evidence of negligence? (1) Actions by non-employees at common law.—In actions by travelers and others who are not employees of the defendant, it has been repeatedly decided that proof that the plaintiff was injured on the defendant's premises, or by some cause originating on his premises, is, in the absence of a defensive explanation, sufficient prima facie evidence of defendant's negligence to entitle the plaintiff to go to the jury.[1] The grounds of these decisions are that the defendant is liable to such persons for the negligence of his employees as well as for that of himself; and that, as the premises are under the exclusive management and control of the defendant or his employees, the injury is more naturally to be attributed to his or their acts than to the act of a stranger, and his means or sources of knowledge are superior to those of the plaintiff. Unless, therefore, the defendant explains the accident by proof that it was caused by a stranger or by some other cause for which he is not responsible, the plaintiff is entitled to go to the jury, and a verdict in his favor will stand.

[1] Feital v. Middlesex R. Co., 109 Mass. 398; 12 Am. R. 720; White v. Boston &c. R. Co., 144 Mass. 404; 11 N. E. 552; Thomas v. Western Union Tel. Co., 100 Mass. 156; Hicks v. New York &c. R. Co., 164 Mass. 424; 41 N. E. 721; 49 Am. St. 471; Howser v. Cumberland &c. R. Co., 80 Md. 146; 30 Atl. 906; 27 L. R. A. 154; Stokes v. Saltonstall, 13 Peters 181; Gleeson v. Virginia Midland R. Co., 140 U. S. 435; 11 S. Ct. 859; Rose v. Stephens Trans. Co., 11 Fed. 438; Judson v. Giant Powder Co., 107 Cal. 549; 40 Pac. 1020; 48 Am. St. 146; 29 L. R. A. 718; Dixon v. Pluns, 98 Cal. 384; 33 Pac. 268; 20 L. R. A. 698; 35 Am. St. 180; Volkmar v. Manhattan R. Co., 134 N. Y. 418; 31 N. E. 870; 30 Am. St. 678; Mullen v. St. John, 57 N. Y. 567; 6 Am. R. 691; Cummings v. National Furnace Co., 60 Wis. 603; 18 N. W. 742; 20 N. W. 665; Kirst v. Milwaukee &c. R. Co., 46 Wis. 489; 1 N. W. 89; Iron R. Co. v. Mowery, 36 Ohio St. 418; 38 Am. R. 597; Ryder v. Kinsey, 62 Minn. 85; 64 N. W. 94; Scott v. London Docks Co., 3 H. & C. 596; Carpue v. London &c. R. Co., 5 Q. B. 747; Kearney v. London &c. R. Co., L. R. 6 Q. B. 759. Contra, Walker v. Chicago &c. R. Co., 71 Iowa 658; 33 N. W. 224.

Although this rule modifies the rule relating to the burden of proof, it does not cast the burden on the defendant; the plaintiff still retains the burden of showing that the defendant's negligence caused his injury. Such evidence, however, on the part of the plaintiff is not conclusive in his favor, nor is he entitled to a ruling to that effect. It should be taken into consideration by the jury and allowed such weight only as they think reasonable. Hence, if they return a verdict for the defendant, it will not be set aside because the presiding judge refused to rule that it was conclusive evidence, or that it changed the burden of proof.[1]

It has been decided by the courts of some jurisdictions that this presumption of negligence arises only when there is a contractual relation between the plaintiff and the defendant, such as that of passenger and carrier, and that the doctrine does not apply to persons in other relations.[2] The better view, however, seems to be that the existence of such contractual relation is not essential, and that the presumption arises without it.[3]

In Manning v. West End St. R. Co. (Mass.),[4] the plaintiff, while walking across a street in Boston, was struck by a stick which flew from the hands of the defendant's car-conductor, who was using it to free the trolley, which had caught in the frog at the junction of some overhead wires. It was held that the evidence warranted a finding of negligence on the part of the defendant. In

[1] Le Barron v. East Boston Ferry Co., 11 Allen (Mass.) 312; 87 Am. D. 717.

[2] Huff v. Austin, 46 Ohio St. 386; 21 N. E. 864; 15 Am. St. 613; Young v. Bransford, 12 Lea (Tenn.) 232.

[3] Judson v. Giant Powder Co., 107 Cal. 549; 40 Pac. 1020; 48 Am. St. 146; 29 L. R. A. 718; Rose v. Stephens Trans. Co., 11 Fed. 438; and other cases cited above under the main proposition.

[4] 166 Mass. 230; 44 N. E. 135.

delivering the court's opinion, Mr. Justice Holmes said (page 231): "Apart from the possibility that he (the conductor) might receive an electric shock sufficient to make him let go his hold, the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands; and to infer from those general propositions of experience that there was negligence in the particular case."[1]

In Wolf v. Downey (N. Y.)[2] the plaintiff was injured by the fall of a brick from a high building in process of erection. The owner employed nineteen independent contractors, who had 250 men in all, to do different parts of the work. The suit was against the owner and the masons and carpenters. There was no evidence to show who set the brick in motion, or from what part of the building it fell, and at the time of the injury the workmen of several contractors were engaged in or upon the building. At the trial the court ruled that the action could not be maintained against the owner, but that a verdict might be rendered against the contractors for the mason and carpentry-work, unless they proved that the brick was not set in motion by their men. It was held that the evidence did not warrant a verdict against either of these contractors, and that the instruction was erroneous.

In Cleveland &c. R. Co. v. Berry (Ind.),[3] an employee

[1] See Graham v. Badger, 164 Mass. 42; 41 N. E. 61; Uggla v. West End St. R. Co., 160 Mass. 351; 35 N. E. 1126; 39 Am. St. 481; White v. Boston &c. R. Co., 144 Mass. 404; 11 N. E. 552.

[2] 164 N. Y. 30; 58 N. E. 31; 51 L. R. A. 241 (1900).

[3] 152 Ind. 607; 53 N. E. 415.

of the Baltimore & Southwestern Railroad Company, while standing ten feet from the track, used by the defendant railroad company, and in the proper discharge of his duties, was struck by an iron pin, alleged by the plaintiff to have been thrown from the tender of a passing train by its speed of forty-two miles an hour, while running on a two-degree curve on a smooth track. The opinion of Mr. Justice Baker contains a discussion of the doctrine of Res ipsa loquitur (pp. 616–620), and on page 618 he says: "In the class of cases to which this belongs, wherein the gist of the action lies in the failure of the defendant to exercise reasonable care, the maxim Res ipsa loquitur can be allowed no broader scope than this: If the evidence which shows the injury discloses in itself that the defendant in relation to the causal act or omission did not exercise that degree of care which the law requires, the plaintiff has discharged the burden of proving negligence; otherwise not."

§ 206. Same—(2) Common-law rule in actions by employees.—This rule, however, does not apply to actions between employee and employer for personal injuries founded on negligence. As between these two classes of persons it can not be affirmed that the employer has the exclusive management or control of the premises, or that his means or sources of knowledge are superior to those of the employee; and it is well settled that the common employer is not liable to one employee for the negligence of a fellow servant. It is, therefore, generally ruled at common law that unless an employee shows more than that he was injured while lawfully engaged on his employer's work or premises, he is not entitled to go to the jury on the question of defendant's negligence, and that a verdict should be directed for the defendant.[1]

[1] Reed v. Boston &c. R. Co., 164 Mass. 129; 41 N. E. 64; Duffy v. Upton, 113 Mass. 544; Nason v. West. 78 Me. 253; 3 Atl. 911 Toledo

In Bishop v. Brown (Colo.)[1] it was held that where a steam-boiler in charge of a coemployee explodes and injures the plaintiff, there is no presumption of negligence on the part of the employer. In Denver &c. R. Co. v. McComas (Colo.)[2] it was ruled that evidence that there was an accident on defendant's railroad and that the plaintiff, an employee, was injured in the accident, does not sustain the burden of showing negligence on the defendant's part, nor entitle the plaintiff to a verdict.

In the case of Ouillette v. Overman Wheel Co. (Mass.),[3] the plaintiff, while standing in his place on the floor of defendant's factory, was injured by the falling upon him of shafting and pulleys fastened to beams overhead by two hangers. He contended, and introduced evidence tending to show, that the shaft and the machinery connected with it, and its method of attachment to the floor above, were improper and insecure, and that the defendant ought to have known their unsafe condition. At the trial the defendant requested the judge to rule that "no burden rests on the defendant to show or explain the cause of the accident." In his charge to the jury the justice stated, on page 309, "that under some circumstances the plaintiff's injury from the breaking of the defendant's machinery, especially where the means of explanation are more likely to be within the control of the defendant than of the plaintiff, is itself evidence of negligence. The breaking of the machinery, in connection with a failure on the part of one who presumably can explain to give

&c. R. Co. v. Moore, 77 Ill. 217; Hudson v. Rome &c. R. Co., 145 N. Y. 408; 40 N. E. 8; Mobile &c. R. Co. v. Thomas, 42 Ala. 672; Louisville &c. R. Co. v. Allen, 78 Ala. 494; Short v. New Orleans &c. R. Co., 69 Miss. 848; 13 So. 826.

[1] 14 Colo. App. 535; 61 Pac. 50 (1900).

[2] 7 Colo. App. 121; 42 Pac. 676 (1895).

[3] 162 Mass. 306; 38 N. E. 511.

explanation, may be evidence of want of care in providing it. But this principle has no application to this case. The injury, though caused by the breaking of the defendant's machinery, is not in itself evidence that the defendant was wanting in due care to provide a reasonably safe place for the plaintiff to do his work in." The jury returned a verdict for the plaintiff and the defendant excepted. The full court overruled this exception, on the ground that the instruction, that under the circumstances of the case the breaking of the machinery was no evidence of negligence on the defendant's part, was more favorable to the defendant than the ruling requested by it that the defendant was not bound to explain the cause of the accident.

There are, however, some cases of a contrary tendency. In Barnowsky v. Helson (Mich.)[1] it was held that the falling of a roof of a building which the defendant was engaged in raising, by which the plaintiff's intestate, while in the employ of the defendant, was killed, raised a presumption of negligence on the defendant's part which entitled the plaintiff to go to the jury, in the absence of a defensive explanation by the defendant showing that the roof fell without his fault. The evidence for the plaintiff tended to show that while the roof was being raised by the defendant under a contract with the owner of the building, by means of jack-screws placed upon boxes made for that purpose, it suddenly slipped or tipped away from the braces, and fell upon the deceased, who was working upon one of the walls of the building. In delivering the court's opinion, Mr. Justice Morse says, on pages 524, 525: "In this case the falling of the roof was in and of itself some evidence that the work of raising it was not being done with the ordinary care and skill. It is true that the mere fact of an injury does not impute negligence on the part

[1] 89 Mich. 523; 50 N. W. 989; 15 L. R. A. 33 and note.

of any one; but where a thing happens which would not ordinarily have occurred if due care had been used, the fact of such happening raises a presumption of negligence in some one. For instance, if the wall of a building falls down and injures a person walking along the street or standing beside the building, the clear presumption is that the building was either negligently built, or that it was not kept in a reasonably safe condition after it was erected, since buildings properly constructed do not ordinarily fall of their own weight.[1] In the present case it must be apparent, and within the knowledge of every one, that a roof of this kind could be raised safely, and without falling, if such raising were done with proper care and caution, and by one having the necessary skill and experience to manage the work."

In Mulcairns v. City of Janesville (Wis.)[2] it was held that, in an action against a city by one of its employees, the fact that the wall of a cistern, which was in course of construction by the city, fell by its own weight, or through the pressure of earth and gravel behind it placed there by the city, and injured the plaintiff while he was working upon it, raised a presumption of negligence on the part of the defendant.[3]

§ 207. Slight evidence sufficient, but not mere scintilla.—At the same time, it requires but little additional evidence on the part of the employee to turn the scale in his favor and to warrant a verdict for him, on the ground that the employer was negligent.

In Toy v. United States Cartridge Co. (Mass.)[4] the

[1] This point was decided in Mullen v. St. John, 57 N. Y. 567; 15 Am. R. 530.

[2] 67 Wis. 24; 29 N. W. 565.

[3] See also, Posey v. Scoville, 10 Fed. 140; Grimsley v. Hankins, 46 Fed. 400.

[4] 159 Mass. 313; 34 N. W. 461.

plaintiff, while in the defendant's employ, was injured by the breaking of a punch in a cartridge-machine which she was operating. She testified that the second hand had put in a new punch, because she had complained of the old one as scratching; that the second time she used the new one it burst and caused her injuries; that, before she started the machine, she saw a small black mark that extended halfway round the punch about in the middle of it; and that "she did not know what this black mark meant, but that it looked like a knitting-needle that had gone rusty and black." The foreman and the second hand testified that they saw nothing the matter with the punch. It was held that there was sufficient evidence of negligence to warrant a verdict for the plaintiff, and that the case should have been submitted to the jury.[1]

In Graham v. Badger (Mass.)[2] the plaintiff, while in the defendant's employ, was injured by an iron block falling upon him from a derrick. The fall of the block was due to the breaking of a rope at a point where it had been spliced. The weight attached to the rope was not sufficient to break or to endanger the apparatus if it had been in proper condition. The defendant's evidence, if believed by the jury, tended to show that the breaking of the rope was due to its kinking and being caught in a wheel. At the trial the defendant requested the judge to rule that the mere breaking of the rope was not prima facie evidence of negligence on the defendant's part. The judge refused to rule as requested, and instead instructed the jury that, if they found that the rope was defective while in the defendant's care, that fact was evidence which, unexplained, would warrant them in finding that

[1] Other cases to the same effect are: Moynihan v. Hills Co., 146 Mass. 586; 16 N. E. 574; Spicer v. South Boston Iron Co., 138 Mass. 426.

[2] 164 Mass. 42; 41 N. E. 61.

the defendant was negligent. It was held that the refusal to rule as requested by the defendant, and the ruling given, were both correct; that the jury were not bound to believe the explanation offered by the defense if it seemed to them incredible, and that a verdict for the plaintiff was warranted by the evidence; that the jury might infer from the breaking of the rope that it had not been spliced properly, and that this defect might have been discovered by proper inspection, and that the court could not say that the defect was latent or hidden. Although the declaration in this case contains counts under the Employers' Liability Act, the reasoning of the court seems to be confined to the common-law count.

On the other hand, a mere scintilla of evidence of negligence on the defendant's part is not sufficient to entitle the plaintiff to go to the jury, either at common law[1] or under the Employers' Liability Acts,[2] and it may be so controlled by the defendant's evidence as to justify an instruction to find for the defendant. This is especially true when there is no evidence to connect the defendant's negligence with the injury for which suit is brought.[3]

In Hudson v. Rome &c. R. Co. (N. Y.),[4] a fireman of a locomotive was killed by the scorching and consequent collapse, during a trip, of the crown-sheet of the locomotive. His administrator brought this suit against the employer, claiming that the scorching had taken place at some time previous to the trip, and that defendant was negligent in sending the engine out on the road in that

[1] Hudson v. Rome &c. R. Co., 145 N. Y. 408; 40 N. E. 8; Nason v. West, 78 Maine 253; 3 Atl. 911.

[2] Shea v. Wellington, 163 Mass. 364; 40 N. E. 173; Ross v. Pearson Cordage Co., 164 Mass. 257; 41 N. E. 284; 49 Am. St. 459; Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619; Tuck v. Louisville &c. R. Co., 98 Ala. 150; 12 So. 168.

[3] Wakelin v. London &c. R. Co., 12 App. Cas. 41.

[4] 145 N. Y. 408; 40 N. E. 8.

condition. The only evidence which tended to support this view was the testimony of the engineer, who stated that he had kept the crown-sheet covered with water throughout the trip, and that it had two full gauges of water over it but a few minutes before the accident. Two experts testified for the defendant that in their opinion, based on an examination of the parts of the locomotive after the accident, the scorching was done at or very near the time of the collapse, and that it was caused by the crown-sheet not being properly covered with water. It was the duty of the engineer to keep the crown-sheet covered with water during the trip. It was held, reversing Hudson v. Rome &c. R. Co.,[1] that the evidence was not sufficient to warrant a verdict for the plaintiff; that the evidence of defendant's negligence was a mere scintilla, which was controlled by the defendant's experts.

In Welsh v. Cornell (N. Y.)[2] the plaintiff was injured while in the defendant's employ by the breaking of an iron clamp. He was using the clamp in the way it was intended to be used, and his experts testified that the clamp would not have broken unless it was in some way defective. There was no other evidence, however, that the clamp was defectively made or was made of defective iron, and in an action at common law it was held that this evidence would not warrant a verdict for the plaintiff.

Likewise it has been held that the mere breaking of a rope without any evidence of a defect in it or that it was not strong enough for the place, does not show negligence on the part of the employer, where there is no evidence that the employer did not supply a sufficient quantity of proper ropes.[3]

[1] 73 Hun (N. Y.) 467; 26 N. Y. Supp. 386.
[2] 168 N. Y. 508; 61 N. E. 891.
[3] Adasken v. Gilbert, 165 Mass. 443; 43 N. E. 199.

§ 208. Automatic starting of machinery.—In the case of injuries caused by the automatic starting of machinery while the plaintiff is engaged in his ordinary duties, only slight evidence of a defect, or of the employer's negligence, is necessary to establish a prima facie case. In Donahue v. Drown (Mass.)[1] the plaintiff, while cleaning a machine at rest, that being part of her duty, was injured by its automatic starting. "There was evidence that the machine was not put up properly; that the driving-pulley upon the main shaft had a convex surface, instead of a flat surface such as it should have had, and was so fixed with reference to the fixed pulley that the tendency was to draw the belt from the loose pulley when the machine was not in motion on to the fixed pulley, and thus to start the machine."[2] It also appeared that the machine in question, as well as others in the defendant's factory, had previously started automatically. It was held that such evidence would warrant a finding of the defendant's negligence.

In Mooney v. Connecticut River Lumber Co. (Mass.)[3] the plaintiff was injured by the automatic starting of a carriage connected with a sawing-machine in the defendant's mill. The carriage was run by steam up and down a track. It was undisputed that a machine which would so start was improperly constructed or adjusted, and was unsafe. Three days before the accident the machine had started in the same manner when no one was near it. The defendant's foreman knew this fact, as well as the plaintiff, and the foreman told the plaintiff that it had been repaired, and it had worked perfectly afterwards up to

[1] 154 Mass. 21; 27 N. E. 675.

[2] This statement of facts is taken from the court's opinion by Lathrop, J., in Ross v. Pearson Cordage Co., 164 Mass. 257, 262; 41 N. E. 284; 49 Am. St. 459.

[3] 154 Mass. 407; 28 N. E. 352.

the time of the accident. It was held that the plaintiff was entitled to go to the jury on the question of the defendant's negligence.[1]

The fact, however, that the machine is not supplied with a safety-appliance, which would have prevented its automatic starting, although coupled with expert testimony that the machine was dangerous without such safety-appliance, will not require its submission to the jury, either at common law or under the Employers' Liability Act. In Ross v. Pearson Cordage Co. (Mass.)[2] the plaintiff, while engaged in cleaning a machine known as a drawing-frame, which was then at rest, had her hand caught in its cog-wheels by its automatic starting. The machine was of the ordinary construction, and was started and stopped by a belt-shipper, used to throw the driving-belt from the loose pulley to the tight pulley to start the machine, and the reverse to stop it. The machine required two persons to operate it, one at the shipper end and one at the opposite end of the machine. The shipper was about two feet long, with nothing to hold it in place except that it was pivoted in the center. The plaintiff's expert testified that a machine operated in that manner by two persons had some special danger, which rendered it necessary to have the shifting-bar latched or locked, in order to prevent the belt from running from the loose on to the tight pulley and starting the machine. There was no latch or lock on the shifting-bar, and the plaintiff contended that the absence of such a safety-appliance was a defect in the condition of the defendant's machinery which entitled her to go to the jury either on her common-law or statutory count; but the court held the contrary. In

[1] See also, Connors v. Durite Mfg. Co., 156 Mass. 163; 30 N. E. 559; Packer v. Thompson-Houston Elec. Co., 175 Mass. 496; 56 N. E. 704 (1900).

[2] 164 Mass. 257; 41 N. E. 284; 49 Am. St. 459.

delivering the opinion, Mr. Justice Lathrop says, on page 262: "The machine was in the same condition at the time of the accident as it was when the plaintiff entered the defendant's employ. There is no evidence that there was any defect in it, or that it differed from similar machines in use elsewhere. The mere fact that certain contrivances, if on the machine, might have prevented its starting, is not enough to charge the defendant; and we see no evidence to warrant the jury in finding that there was any breach of duty on the part of the defendant."

In Dingley v. Star Knitting Co. (N. Y.)[1] a boy fifteen years of age was injured by the automatic starting of a carding-machine. It had started in the same way three times previously, but no defect in the machine was pointed out in the evidence at the trial. It was held by four justices (two justices dissenting) that the evidence would not warrant a finding of negligence on defendant's part, and that a nonsuit was properly ordered.

§ 209. Inference against defendant when he introduces no evidence.—This rule applies with greater force when the defendant does not introduce any evidence respecting the cause of the accident. In such case the jury is entitled to draw an inference against the defendant. Thus, in a leading Massachusetts case, Griffin v. Boston &c. R. Co. (Mass.),[2] a night-watchman in the defendant's employ was killed by the rear part of a freight-train, which had separated into two parts before it reached his station. The only evidence tending to show negligence of the defendant was that the coupling-link between the two cars which separated had spread or opened sufficiently wide to allow the coupling-pin to come out. The defendant offered no evidence whatever. It was held that, in the absence of a

[1] 134 N. Y. 552; 32 N. E. 35.
[2] 148 Mass. 143; 19 N. E. 166; 12 Am. St. 526; 1 L. R. A. 698.

defensive explanation respecting the cause of the injury, the evidence established a prima facie case of negligence which would warrant a verdict in favor of the plaintiff.[1] In delivering the court's opinion, Mr. Justice Charles Allen says, on page 147: "The separation of a train in consequence of the spreading of a link, where nothing further appears, is more naturally to be attributed to an imperfection or defect in the link than to any other cause. Ordinarily such separation would not happen if the link was sound and suitable for use. If the link was not sound and suitable for use the fact of its being used in that connection properly calls for explanation from the defendant; and if, under such circumstances, the defendant fails to put in any evidence some inference against it may be drawn therefrom. The fact may be susceptible of an explanation sufficient to exonerate the defendant. But, in the absence of such explanation, we think the jury might properly infer negligence on the part of the defendant."

§ 210. What amounts to a "defensive explanation" of the injury.—A "defensive explanation" of the injury means an explanation founded upon a cause for which the defendant is not responsible to the plaintiff.

Joy v. Winnisimmet Co. (Mass.)[2] presents an illustration of a "defensive explanation" respecting the cause of the injury. The plaintiff was a passenger on a ferry-boat owned by the defendant, and was injured while leaving the boat by being crushed between the boat and the landing-slip. The plaintiff's evidence showed that a chain used to prevent the passengers from leaving the boat before it was fastened to the slip had been removed before it

[1] See also, to the same effect, Guthrie v. Maine Cent. R. Co., 81 Me. 572; 18 Atl. 295.

[2] 114 Mass. 63.

was so fastened; but his evidence did not show that any of the defendant's servants had removed the chain, unless the fact that the chain had been removed when he attempted to leave the boat was evidence of that fact. It also appeared that about fifty persons had pressed forward and left the boat in advance of the plaintiff. On behalf of the defendant, the servant whose duty it was to fasten the boat and remove the chain testified, without contradiction, that at the time of the accident he had not finished securing the boat, and had not removed the chain. It was held that the evidence would not warrant a finding of negligence on defendant's part, and that the plaintiff was not entitled to go to the jury.

In Gibson v. International Trust Company (Mass.)[1] the plaintiff was injured while attempting to get out of a passenger-elevator in the defendant's office-building. When the elevator reached the street floor the elevator-boy stopped the descent of the elevator, opened the elevator-door, and attempted to take his seat upon a movable stool inside of the elevator-car. He did not succeed in finding the stool, fell to the floor of the car, and involuntarily grasped the lever of the elevator, which caused the elevator to descend just as the plaintiff was stepping out of the car. The plaintiff was caught by the descent of the car and injured. The undisputed evidence showed further that the stool upon which the elevator-boy was accustomed to sit when not actually operating the car was pulled from its accustomed place by the janitor of the building, who happened to be riding in the same car as a passenger. The court held that the elevator-boy was free from negligence and that the defendant was not responsible for the negligent act of the janitor because he was not acting within the scope of his employment at that time, and that therefore the plaintiff could not recover.

[1] 177 Mass. 100; 58 N. E. 278.

If the undisputed evidence shows that the injury was caused by a latent defect, which could not have been discovered and remedied by ordinary care and inspection, this will constitute a defensive explanation and rebut the presumption of negligence, and warrant an instruction to find for the defendant. In Ryder v. Kinsey (Minn.)[1] the plaintiff, while walking along a public street in the city of St. Paul, was injured by the fall of a wall of a small building owned by the defendant. The building had been bought by the defendant after its construction, and there was nothing in its external appearance to indicate a defective condition. After the wall fell, it was discovered that it had not been "anchored," or supported in the manner usual in the case of such veneered brick walls, and this was the cause of its fall. It was held that this was a latent defect in the wall which could not have been discovered by ordinary care; that such undisputed evidence furnished an explanation respecting the cause of the wall's falling, and justified a direction to return a verdict for the defendant.[2]

In Griffin v. Boston &c. R. Co. (Mass.),[3] the facts of which are stated in section 209 above, it was held that if a fellow servant had caused the separation of the train by pulling the coupling-pin, or if its separation had been caused by any other matter for which the defendant was not responsible to the plaintiff, this would have constituted a defensive explanation which would have justified an instruction to find for the defendant.

The jury are, of course, not bound to believe the explanation offered by the defendant, and therefore, if it be disputed by the plaintiff, the question should be submitted

[1] 62 Minn. 85; 64 N. W. 94; 54 Am. St. 623; 34 L. R. A. 557.
[2] See also, Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574.
[3] 148 Mass. 143; 19 N. E. 166; 12 Am. St. 526; 1 L. R. A. 698.

to the jury with proper instructions, and should not be withdrawn from them.[1]

§ 211. Actions under Employers' Liability Acts—Subdivisions of subject.—This subject will be discussed under three subdivisions, as follows:

(a) Defects in the ways, works, machinery, or plant;
(b) Negligence of a superintendent;
(c) Negligence of a person in charge or control of any signal, switch, locomotive-engine, or train upon a railroad.

§ 212. (a) Defects in the ways, works, machinery, or plant.—In Bowers v. Connecticut River R. Co. (Mass.),[2] a freight-brakeman was injured while attempting to couple two foreign cars then in use by the defendant railroad. The defect complained of was too much lateral motion or play of the draw-bars, which allowed one draw-bar to slip out of place and by the other draw-bar, which defect had not been discovered or remedied owing to the negligence of the defendant's car-inspector. One witness for the plaintiff testified that there was "all of four inches'" play in the draw-bar of one of the cars, and "not quite so much play" in the draw-bar of the other car, and that there ought not to be over an inch play in the draw-bars. Car-inspectors were furnished by the defendant at the station where the injury occurred. Under the first count, which was at common law, it was held that a verdict was properly ordered for the defendant, because there was no sufficient evidence that the defendant had failed to make proper provision for the inspection of foreign cars, and the negligence in not discovering the defect, if any, was that of a fellow servant, the defendant's common-law duty

[1] Graham v. Badger, 164 Mass. 42; 41 N. E. 61; Volkmar v. Manhattan R. Co., 134 N. Y. 418; 31 N. E. 870; 30 Am. St. 678.
[2] 162 Mass. 312; 38 N. E. 508.

being merely that of inspection.[1] With respect to the second count, however, which was under the Employers' Liability Act, for a defect in the condition of the ways, works, or machinery, etc., it was held that the plaintiff was entitled to go to the jury; that the cars, though not owned by the defendant, must be deemed a part of its works and machinery within the meaning of the act, and that there was sufficient evidence of a defect therein,[2] and of negligence on the part of the car-inspector in failing to discover or remedy the defect, to warrant a verdict for the plaintiff.

In Kansas City &c. R. Co. v. Webb (Ala.)[3] a locomotive jumped the track and injured the engineer. The plaintiff's evidence tended to show that two defects in the track had existed for some weeks before the accident, to the knowledge of the road-master and section-foreman, and that they had failed to remedy them; first, that a split rail which had formed part of a switch had been allowed to remain after the use of the switch had been discontinued, and that this rail had been insecurely fastened, and had become loose and out of line with the succeeding rail; second, that in constructing the curve where the accident happened, which was on a scale of fourteen degrees, the outer rail was not sufficiently raised above the inner rail. In an action under the Employers' Liability Act, it was held that the plaintiff was entitled to go to the jury, and that a finding of negligence on the part of the defendant railroad was warranted by the evidence.

The mere fact, however, that a car-brake sticks does not constitute a defect in its condition within the Alabama statute, nor entitle the plaintiff to go to the jury.

[1] Mackin v. Boston &c. R. Co., 135 Mass. 201; 46 Am. R. 456.

[2] The draw-bar of a locomotive-engine, if placed too low, may be a defect which will render an employer liable to an employee even at common law: Lawless v. Connecticut River R. Co., 136 Mass. 1.

[3] 97 Ala. 157; 11 So. 888.

In Louisville &c. R. Co. v. Binion (Ala.)[1] a freight-brakeman, while making a third attempt to let off a sticking brake, was thrown between the moving cars and injured. He had himself set the brake a short time before the accident. There being no other evidence that the brake was defective, it was held that an action under the Employers' Liability Act could not be maintained, and that the presiding justice should have given the general affirmative charge for the defendant.

Nor does the fact that a brakeman was injured through the breaking of the brake-rod of a railroad-car constitute sufficient evidence of negligence to require the submission of the case to the jury, even when half of the break was an old and rusty break, if it was so situated under the car as to form a hidden defect which could not be discovered upon careful inspection.[2] On the second appeal of this case it further appeared in evidence that the car was one of the oldest in the defendant's service, that the timbers and flooring were cracked, worn and slivered from use, and the siding was badly worn. It was held that although the defect which caused the injury to the plaintiff was a latent defect in the brake-rod, yet these additional facts required the submission of the case to the jury upon the question of the defendant's negligence.[3]

The breaking or slipping of the defendant's machinery, tools or appliances while being misused by the plaintiff, or put to some other use than that for which the defendant furnished them, will not authorize a verdict for the injured employee, either at common law[4] or under the Employers' Liability Act.

[1] 98 Ala. 570; 14 So. 619.
[2] Louisville &c. R. Co. v. Campbell, 97 Ala. 147; 12 So. 574.
[3] Campbell v. Louisville &c. R. Co., 109 Ala. 520; 19 So. 975 (1896).
[4] Felch v. Allen, 98 Mass. 572; Coleman v. Mechanics' Iron Foundry

In Quirouet v. Alabama &c. R. Co. (Ga.)[1] the plaintiff, a brakeman, was injured while mounting a car in motion, by the turning or slipping in its socket of a standard, which he took hold of. The standard was put on the car for the purpose of preventing the freight from falling off, and not for the purpose of assisting trainmen in getting on to the cars. It was held that the employer was not liable, either at common law or under the Alabama Employers' Liability Act.

§ 213. Same.—In Allen v. Smith Iron Co. (Mass.)[2] an employee was killed by the breaking of a wooden lever, which was being used to raise an iron door, which formed half the bottom of a cylindrical furnace. In an action under the Employers' Liability Act by his administratrix, it appeared that the lever had been in use for a long time, but was not specially worn at the point of strain, and the plaintiff claimed that she was entitled to go to the jury on the ground that the defendant failed to furnish a proper lever. It was held that a verdict should have been directed for the defendant. In delivering the opinion of the court, Mr. Justice Holmes says, on page 558: "In the first place, there is no evidence that the stick [lever] was defective except that it broke, and none that it appeared to be defective, or could have been discovered to be so. It had been in use for a long time, but was not specially worn at the point of strain. It would not have been permissible for the jury to find that the stick ought to have been known to be defective because of its age alone."

In Tuck v. Louisville &c. R. Co. (Ala.),[3] an action under the Alabama statute, a freight-brakeman was killed

Co., 168 Mass. 254, 257; 46 N. E. 1065; Persian Monarch, 14 U. S. App. 158; 55 Fed. 333; Griffiths v. Gidlow, 3 H. & N. 648; Norman v. Dublin Distillery Co. (1893), 32 L. R. Ir. 399.

[1] 111 Ga. 315; 36 S. E. 599 (1900).

[2] 160 Mass. 557; 36 N. E. 581.

[3] 98 Ala. 150; 12 So. 168.

while in the discharge of his duties. The plaintiff's evidence showed that after the freight-train had proceeded eighty miles it separated into two parts by reason of a tail-bolt, which held the cars together, drawing out. It was held that the fact that the train separated under these circumstances was not sufficient evidence of a defect in the condition of the machinery of the defendant to entitle the plaintiff to go to the jury, and that a verdict was properly ordered for the defendant.

In Richmond &c. R. Co. v. Weems (Ala.)[1] the plaintiff, while engaged in working a derrick, was injured by the breaking of the gudgeon-pin which fastened the arms of the derrick to the mast. The pin was a comparatively new one, and was made of steel. The plaintiff's evidence tended to show that the pin was too small and should have been made of iron, and contended that it constituted a defect in the defendant's machinery, and that it was unsafe and unfit for the purpose for which it was intended and used. The defendant's evidence was of a contrary tendency. It was held that the question of defendant's negligence in furnishing such a pin was one for the jury, and that the affirmative charge to find for the defendant was properly refused.

In Bivins v. Georgia Pac. R. Co. (Ala.)[2] a freight-brakeman, while attempting to board his train in motion after setting a switch, caught his clothes on the switch-handle, and was pulled off the car and fell under the wheels. The only defect complained of was that the sill on which the machinery rested for throwing the switch extended beyond the track embankment, and that there was no filling under the extension so as to bring the embankment up to a level with it. The switch had been in the

[1] 97 Ala. 270; 12 So. 186.
[2] 96 Ala. 325; 11 So. 68.

same condition for five years prior to the injury, during which period no accident had occurred, and the plaintiff was familiar with the switch, having been a brakeman on that section of the road for four months. There was no proof, other than the accident itself, that machinery thus constructed was dangerous. It was held that an instruction to find for the defendant was properly given.

In Bridges v. Tennessee Coal &c. Co. (Ala.),[1] the plaintiff's intestate was killed by the explosion of a steam-boiler. For months prior to the accident the deceased knew the dangerous and defective condition of the boiler, and complained of it, but continued to use it without any promise to repair it. On the morning of the accident he said that he would worry through the month with the boiler,—four days longer,—and would then quit the service unless it was thoroughly repaired. The court stated that the desire to serve the defendant was no doubt the controlling inducement to remain, but held that the conduct and knowledge of the deceased showed an assumption of the risk, which prevented a recovery under the Employers' Liability Act.

In Smith v. Baker,[2] an action under the English act of 1880, Lord Halsbury, L. C., says, though he immediately adds that the question of the defendant's negligence was not open on that appeal: "I think the unexplained and unaccounted-for fact that the stone was being lifted over a workman, and that it fell and did him damage, would be evidence for a jury to consider of negligence in the person responsible for the operation."

§ 214. (b) Negligence of a superintendent.[3]—In Mahoney v. New York &c. R. Co. (Mass.)[4] a freight-handler

[1] 109 Ala. 287; 19 So. 495 (1896).
[2] (1891) A. C. 325, 335.
[3] For other cases upon this subject, see ch. 4, §§ 85–98, ante.
[4] 160 Mass. 573; 36 N. E. 588.

was injured while assisting in unloading a bale of burlaps, weighing about 2,200 pounds, from an express-wagon. One Grady was the section-boss who superintended the unloading, and whose negligence the plaintiff alleged caused his injury. The express-wagon had been backed up to the door of defendant's freight-house, and, while the plaintiff and others were trying to push the bale of burlaps from the wagon into the freight-house, the rear of the wagon settled down, the bale fell out, the wagon was forced into the street, and the plaintiff was thrown out under the bale and injured. Grady had ordered the teamster to trig or scotch the wheels of the wagon, but he had not used a gang-plank which was near by, and which would have prevented the accident if it had been used. It was held that the evidence justified a finding that the superintendent, Grady, was negligent. In the course of the opinion, Mr. Justice Knowlton says, on page 579: "The mere happening of an accident, if it is one that the exercise of ordinary care would commonly prevent, is some evidence of negligence.[1] Grady, the superintendent, had the responsibility of determining how the bales should be loaded [unloaded]. It was proved that there was a gang-plank near by which might have been used, and which if used would have prevented this accident. The jury may have found from the evidence that, if the wheels of the wagon had been more securely trigged or scotched, it would not have moved forward from the pressure and the accident would not have happened. It was the duty of Grady, who ordered the men to unload the bale, to take all reasonable precautions to insure their safety. In this respect his relation to the work differed materially from that of the plaintiff and the other men. The plaintiff had a right to assume that the wheels were properly trigged,

[1] Citing White v. Boston &c. R. Co., 144 Mass. 404; 11 N. E. 552.

and that the method selected by the foreman for unloading was safe and proper."

In Hennessy v. City of Boston (Mass.)[1] a laborer, while digging a trench, was injured by the side caving in, through the negligence, as he alleged, of the defendant's superintendent. There were no braces in the trench, which was deep, long and narrow, except two blocks of earth about four feet wide, which were left untouched, and these blocks were about twenty-five feet apart. There was no unexpected or extraneous cause for the caving in of the earth. It was held that the plaintiff was entitled to go to the jury on the question of the superintendent's negligence. In the language of the court, stated by Mr. Justice Knowlton, on page 503: "It was an accident of a kind that is commonly preventable by the exercise of ordinary care; and the accident itself, in connection with the circumstances shown in regard to the depth of the trench and the slope of its sides, and the distance of the braces from each other, furnishes evidence from which the jury might have found negligence on the part of the foreman in charge of the work."[2]

§ 215. Same.—In Carroll v. Willcutt (Mass.)[3] the plaintiff, while engaged in cleaning brick, was struck on the head and leg by a large ledge-stone, which fell from a staging about twenty feet above him. A considerable part of this stone projected over the outside edge of the staging, and had been in that position for two or three days, and the plaintiff claimed that the defendant's superintendent was negligent in not discovering that the stone was so placed as to be liable to fall if it should be hit, or if the staging should be jarred in the prosecution of the

[1] 161 Mass. 502; 37 N. E. 668.
[2] See also, Connolly v. Waltham, 156 Mass. 368; 31 N. E. 302.
[3] 163 Mass. 221; 39 N. E. 1016.

work. How much of the stone projected over the staging could only be seen from above, and there was no evidence that the stone had been so placed by the specific order of the superintendent, or that he had visited that part of the work while the stone was there, or had actual knowledge that the stone was upon the staging. The floors had not been put in, and the roof was not on. In an action under the Massachusetts act, it was held that the evidence would not warrant a finding that the superintendent was negligent, and that a verdict was properly ordered for the defendant.

McCauley v. Norcross (Mass.)[1] was very like Carroll v. Willcutt, supra, in its leading facts; but is distinguishable, chiefly, for the reason that the superintendent ordered the beams, one of which fell and injured the plaintiff, to be put on the floor where they were, and allowed them to remain in a dangerous position for two or three days. It was held that the jury was warranted in finding negligence on the part of the superintendent.

Evidence that the foreman in charge of a railroad roundhouse sent the plaintiff there to make certain repairs upon a locomotive-engine, without warning him of the danger arising from "blowing down" the engine, and without notifying the engineer that the plaintiff had been sent, will not warrant a finding that the foreman was negligent, and a verdict should be ordered for the defendant.[2]

§ 216. (c) Negligence of a person in charge or control of any signal, switch, locomotive-engine, or train upon a railroad.—In Graham v. Boston &c. R. Co. (Mass.)[3] a freight-brakeman was injured, as he alleged, by the negligence of the engineer in charge or control of the train,

[1] 155 Mass. 584; 30 N. E. 464.
[2] Perry v. Old Colony R. Co., 164 Mass. 296; 41 N. E. 289.
[3] 156 Mass. 4; 30 N. E. 359.

by starting the train with an unusual jerk, which caused an oil-tank to slip and crush the plaintiff's hand. The plaintiff testified that he did not know whether the train started suddenly or not. A witness for the plaintiff testified that starting with a jerk is something that will happen on any freight-train, and that he could not swear whether it was a usual or an unusual jerk. The engineer testified that he did not start with an unusual jerk, and that he did nothing out of the ordinary. There was no evidence that the oil-tank would not slip a little when the train was started in the ordinary way. It was held that this evidence would not warrant a finding that the engineer was negligent, and that a verdict should have been ordered for the defendant.

In Birmingham R. Co. v. Wilmer (Ala.)[1] a brakeman, while in the careful discharge of his duty on top of a freight-car, was thrown off and injured by the sudden starting of the train on an up-grade. The plaintiff contended that the engineer in charge of the locomotive was negligent, and he testified that the train was started with an "unusual hard jerk," and it was not disputed that the plaintiff was either knocked off or fell off in consequence of this jerk. In an action under the Alabama act it was held that the statement that the train started with an "unusual hard jerk" was admissible as a "short-hand rendering" of facts, and that the evidence would warrant a finding of negligence on the part of the engineer, for which the defendant was liable. In the court's opinion, delivered by Mr. Justice McClellan, it is said on page 169: "Moreover, it is not disputed that plaintiff was knocked off by, or fell off the train in consequence of, this jerk. This was itself some evidence for the jury that the jerk was unusually and negligently severe. It surely can not be said to be usual or necessary to jerk a train into mo-

[1] 97 Ala. 165; 11 So 886.

tion under any circumstances with such force and suddenness as to hurl employees from the top of it while they, as the jury might have found the plaintiff to be, are ordinarily careful and diligent. The testimony of the plaintiff as to the character of the jerk, the fact that he was thrown off or fell off at the time of the jerk, and his further testimony as to what he was doing at the time and the manner of doing it, which the jury might have believed, and, believing, found that he was using due care to maintain his position, but that, notwithstanding this, the jerk was so violent as to inflict the injury complained of, was such evidence of the engineer's negligence as to require the case to go to the jury."

In Thyng v. Fitchburg R. Co. (Mass.)[1] a brakeman was killed by the breaking apart of a freight-train. The two cars between which the coupling gave way were not the property of the defendant. In this action under the Massachusetts act, the administratrix of the brakeman sought to charge the defendant on the ground that the injury was caused by the negligence of a person having the charge or control of a train. The only evidence which tended to support this view was that too short a coupling-pin had been used in making up the train. The defendant's evidence showed that in the freight-yard where the train was made up there were always pins of all different lengths, and this was undisputed by the plaintiff. It was held that the evidence did not indicate negligence of a person in charge or control of a train as distinguished from negligence of a fellow servant, and that a verdict was properly ordered for the defendant.

§ 217. Same.—Cowen v. Ray[2] was an action under the Indiana Employers' Liability Act for the negligence of a

[1] 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425.
[2] 108 Fed. 320; 47 C. C. A. 352 (1901).

person in charge of a signal. It appeared that a fireman was killed by the collision of two trains on the main track, one of which was attempting to get upon a side-track. The rules of the railroad company required, when a train stopped on the main track between telegraph-stations, that the fireman or brakeman should go forward 1,200 yards and there place torpedoes, and then still further 500 yards and place torpedoes, and then return within 1,500 yards and use his red signal until the arrival of the oncoming train. A brakeman was sent forward six minutes before the approaching train was due and placed torpedoes about 700 yards distant, but no red signal was seen by the engineer of the approaching train, and a collision occurred. It was held by the circuit court of appeals for the seventh circuit (Woods, Jenkins and Grosscup, JJ.), that the brakeman was a person having charge of a signal within the meaning of the statute, and that the evidence warranted a finding that he was negligent in not giving the red signal, and that a verdict for the plaintiff was properly returned.

In Mears v. Boston &c. R. Co. (Mass.)[1] the conductor of a freight-train allowed one of the cars to be "kicked" off on to a track with a descending grade without a brakeman upon it, contrary to the rules of the road. It ran into two freight-cars and killed the plaintiff's husband, while he was inspecting a freight-car in the due performance of his duties. In an action under the act, it was held that the evidence would warrant a finding of negligence on the part of the conductor, for which the defendant was liable, and that the presiding justice erred in ordering a verdict for the defendant.

In Tennessee Coal &c. Co. v. Hayes (Ala.)[2] the plaintiff, while engaged in loading coal into an empty car, was

[1] 163 Mass. 150; 39 N. E. 997.
[2] 97 Ala. 201; 12 So. 98.

injured by another car colliding with his car on a down grade. The person in charge of the second car put it in motion by "pinching," and the first car was at rest. There was some evidence that the second car was supplied with a brake, and that after the car was started no effort was made to stop it by using the brake. It was held that this evidence would justify a finding of negligence for which the defendant was liable under the act. Another part of the evidence tended to show that there was no brake on the car, and that the person in charge of it, one Ried, and his son, undertook to stop the car by putting obstructions on the track in front of it. It was held that the fact that the car was allowed to escape and run wild, when it might have been controlled and moved in safety, would justify an inference of negligence, on the maxim Res ipsa loquitur, and a verdict against the employer under the statute. In the language of the court, by Mr. Justice McClellan, on page 207: "There was, in other words, evidence from which the jury might have found that a car having no brake could with due care have been safely moved and controlled by the Rieds; and from the fact that this one was not so moved and controlled, but allowed to escape and run wild, it not appearing that everything which due care and diligence required was done to control it, the jury were at liberty to infer, on the maxim Res ipsa loquitur, that the requisite care was not used by them."

In Birmingham R. Co. v. Baylor (Ala.)[1] a locomotive-fireman was injured by the train running on to a spur-track from the main track, through the alleged negligence of the person in charge of the switch in leaving it open. The evidence was that the switch had been used about thirty minutes before the accident, and the engineer testified that it was properly secured before he left it. The

[1] 101 Ala. 488; 13 So. 793.

plaintiff's train was the next one to pass the switch, and he testified that his train left the main track and went through the switch on to the spur-track. It was held in this action under the Alabama statute that there was sufficient evidence that the switch was open to require the submission of the case to the jury.

Other cases under this head are cited in the foot-note.[1]

[1] Mary Lee Coal Co. v. Chambliss, 97 Ala. 171; 11 So. 897; Gibbs v. Great Western R. Co., 12 Q. B. D. 208.

CHAPTER XIV.

DIRECTING A NONSUIT OR VERDICT FOR DEFENDANT (CONTINUED).

II. Plaintiff's Contributory Negligence.

SECTION
218. Employee's knowledge of defect or negligence.
219. Tests and illustrations in Massachusetts.
220. Alabama rules.
221. New York Employers' Liability Act, § 3.
222. Employee's death while in discharge of duty—Massachusetts cases.
223. Same—Alabama cases.
224. Indiana and elsewhere—Death while in discharge of duty.

§ 218. Employee's knowledge of defect or negligence.—The fifth section of the Massachusetts act declares that—"An employee or his legal representatives shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who had entrusted to him some general superintendence."[1]

The New York, Alabama and English acts contain the above provision in substance, with the following added at the end thereof: "unless he [the employee] was aware that the master or employer, or such superior, already knew of such defect or negligence." The New York act reads: "unless it shall appear at the trial that such defect

[1] Mass. Rev. Laws 1902, ch. 106, § 77.

or negligence was known to such employer, or superior person, prior to such injuries to the employee."[1]

This section does not create a condition precedent, like that of due notice, which the plaintiff must allege and prove has been fulfilled. Knowledge and failure to inform are matters of defense, and the burden is upon the defendant to show them.[2]

The same rule prevails under the English act.[3]

Under the Alabama act the plaintiff is not obliged to allege or prove that he was aware that the defendant had knowledge of the defect; and that the plaintiff, while having knowledge thereof himself, failed to communicate the fact to the defendant or to some superior employee, is purely matter of defense, relating to contributory negligence of the plaintiff, and the defendant must show it.[4] In Thomas v. Bellamy (Ala.)[5] the plaintiff, while operating a punching-machine, had his eye destroyed by a flying piece of iron, due to a defect in the repair of the machine. The plaintiff had complained of this defect several times to the foreman, and the latter had tried to remedy it but failed. There was no evidence that this foreman, although he was the plaintiff's superior "engaged in the service or employment of the master or employer," was entrusted with the duty of seeing that the machine was in proper condition, and it was accordingly held that the defendant was not liable.[6]

[1] Act of 1902, ch. 600, § 3.

[2] Connolly v. Waltham, 156 Mass. 368; 31 N. E. 302.

[3] Weblin v. Ballard, 17 Q. B. D. 122, 125.

[4] Columbus &c. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90.

[5] 126 Ala. 253; 28 So. 707 (1900).

[6] This decision seems to give a narrow construction to the term "superior" in the act, and to confuse two different clauses. If the defect in the machine was due to the negligence of a person entrusted with the duty of seeing that it was in proper condition, the mere fact that the plaintiff did not notify him, but some superior of his own, ought

The rule of the common law was that the employee's knowledge of the defect causing the injury was not, as matter of law, conclusive evidence of such want of due care as would prevent a recovery from the employer. This was a question for the jury to decide on all the facts and circumstances of the case. If he informed the proper officer of the defect, and was told that it would be remedied, his subsequent use of the appliance within a reasonable time in the defective condition did not constitute negligence on his part, or an assumption of the risk, which would prevent his recovery.[1]

In Indiana it has been recently decided, overruling several earlier cases, that where the employer promises to repair a defect in an appliance as soon as the present job is finished, the employee is relieved from the assumption of the risk, and if injured thereby during the job, may recover at common law. This point was first decided by

not, it is believed, to prevent a recovery. The person entrusted with this duty might not be the plaintiff's superior at all; in which case it would clearly not help the plaintiff to notify him of the defect. The repair-department is generally separate from the operating-department, and the "superior" of an operative would seem to be some one in his own department rather than in the repair-department.

[1] Snow v. Housatonic R. Co., 8 Allen (Mass.) 441; 85 Am. D. 720; Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. R. 589; Hough v. Railway Co., 100 U. S. 213; Laning v. New York Cent. R. Co., 49 N. Y. 521; 10 Am. R. 417; Patterson v. Pittsburg &c. R. Co., 76 Pa. St. 389; 18 Am. R. 412; Conroy v. Vulcan Iron Works, 62 Mo. 35; Flynn v. Kansas City &c. R. Co., 78 Mo. 195; 47 Am. R. 99; Indianapolis &c. R. Co. v. Ott, 11 Ind. App. 564; 38 N. E. 842; 39 N. E. 529; Clarke v. Holmes, 7 H. & N. 937; Union Mfg. Co. v. Morrissey, 40 Ohio St. 148; Missouri Furnace Co. v. Abend, 107 Ill. 44; 47 Am. R. 425; Southern Kansas R. Co. v. Croker, 41 Kan. 747; 21 Pac. 785; Greene v. Minneapolis &c. R. Co., 31 Minn. 248; 17 N. W. 378; 47 Am. R. 785. For qualifying cases, see Counsell v. Hall, 145 Mass. 468; 14 N. E. 530; Lewis v. New York &c. R. Co., 153 Mass. 73; 26 N. E. 431; 10 L. R. A. 513; Westcott v. New York &c. R. Co., 153 Mass. 460; 27 N. E. 10; Levesque v. Janson, 165 Mass. 16; 42 N. E. 335; Silvia v. Wampanoag Mills, 177 Mass. 194; 58 N. E. 590 (1900); Schulz v. Rohe, 149 N. Y. 132; 43 N. E. 420; Burns v. Windfall Mfg. Co., 146 Ind. 261; 45 N. E. 188.

the appellate court in 1898, and was affirmed by the supreme court, and some dicta to the contrary in Standard Oil Co. v. Helmick (Ind.)[1] and Burns v. Windfall Mfg. Co. (Ind.)[2] were disapproved and overruled.[3]

In Daugherty v. Midland Steel Co. (Ind.)[4] it was held that, where the injury happened within six days after the employer's promise to repair the defect was made, it was a question for the jury as to whether the risk had been assumed by the employee.

In Alabama, however, it was decided at common law that, where an employee knew of a defect and remained at work after the employer had broken his promise to remedy the defect, he was guilty of contributory negligence as matter of law, and could not recover for an injury caused by such defect.[5] In an early case under the statute, it was held that this rule was abrogated by the Employers' Liability Act of 1885, on the ground that it was the intention of the act to remedy the injustice to the employee of requiring him to abandon his employment, or to waive his rights against an employer who has neglected to remedy the defect within a reasonable time after notice thereof.[6] In a later case, however, this decision has been expressly overruled, and it is now held in Alabama that continuance in the service of the defendant with knowledge of a defect in the condition of the ways, works, or machinery, though it exists in another department over which the employee has no control, constitutes an assumption of the risk after the lapse of a reasonable time for remedying the defect, and that the doctrine of Volenti non fit

[1] 148 Ind. 457; 47 N. E. 14.
[2] 146 Ind. 261; 45 N. E. 188.
[3] McFarlan Carriage Co. v. Potter, 153 Ind. 107, 116; 53 N. E. 465; McFarlan Carriage Co. v. Potter, 21 Ind. App. 692; 51 N. E. 737.
[4] 23 Ind. App. 78; 53 N. E. 844 (1899).
[5] Eureka Co. v. Bass, 81 Ala. 200; 8 So. 216; 60 Am. R. 152.
[6] Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146.

injuria applies, and prevents a recovery under the statute.[1]

§ 219. Tests and illustrations in Massachusetts.—In an action under the Massachusetts statute Mr. Justice Knowlton, in delivering the opinion of the court, says: "It does not appear that the plaintiff was doing anything which would generally be deemed careless by prudent men, and we can not say, as matter of law, that he was not in the exercise of due care.'"[2] It was held that the case was properly submitted to the jury, and that a verdict for the plaintiff was warranted by the evidence.

In Graham v. Boston &c. R. Co. (Mass.)[3] a freight-brakeman had his hand injured by the shifting of an oil-tank in a car which he was uncoupling from another car in a train. In an action under the statute the plaintiff testified that he had never before seen a car with a space between the oil-tank and the block designed to keep the tank in place; that when he reached over with his right hand to get the coupling-pin he also reached back with his left hand for the grab-iron; that, not finding it, he took hold of the block, and the engineer started up the train with a jerk, and the oil-tank shifted and crushed his hand against the block. It was held that there was sufficient evidence of due care to go to the jury. In delivering the court's opinion, Mr. Justice Knowlton says, on page 8: "We are of opinion that the question whether the plaintiff was in the exercise of due care was rightly submitted to the jury. If he had reflected carefully, he might have known that the tank would be likely to slip a little on the car when the train started up with a jerk; but he testified

[1] Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457.

[2] Mahoney v. New York &c. R. Co., 160 Mass. 573, 579; 36 N. E. 588. See also, Gibson v. Sullivan, 164 Mass. 557; 42 N. E. 110.

[3] 156 Mass. 4; 30 N. E. 359.

that he had never before seen a car with a space between the tank and the block which was designed to keep the tank in place, and it is not very strange, when he reached back with his hand 'to feel if there was a grab-iron there,' that he took hold of the block and exposed his fingers to danger without thinking of the consequences."

In Thompson v. Boston &c. R. Co. (Mass.)[1] a brakeman was injured in the act of jumping off a freight-train in slow motion, in order to set a brake on another part of the train under the conductor's orders. He swung off between two cars, without looking ahead or taking any other precaution to avoid obstructions near the track, and did not see a pile of rails near the track until it was too late for him to regain his position of safety. He was obliged to let go, and fell upon the pile of rails and was injured. It was held that he was guilty of contributory negligence, and could not recover either under the Employers' Liability Act or at common law, and that it was proper to direct a verdict for the defendant.

A workman standing aloft on a pile-driver, engaged in placing a pile in position for driving, is not guilty of contributory negligence if he puts his hand on top of the pile, directly in the line of descent of the hammer; and if his hand is injured by the hammer's falling prematurely, through the negligence of the defendant's superintendent in giving an order, he may recover under the statute.[2]

The rules of the common law upon this subject in Massachusetts are substantially like those stated above under the Employers' Liability Act.[3]

[1] 153 Mass. 391; 26 N. E. 1070.

[2] McPhee v. Scully, 163 Mass. 216; 39 N. E. 1007.

[3] Bjbjian v. Woonsocket Rubber Co., 164 Mass. 214; 41 N. E. 265 (rubber-compounding machine); Degnan v. Jordan, 164 Mass. 84; 41 N. E. 117 (elevator); Murphy v. Webster, 151 Mass. 121; 23 N. E. 842; 156 Mass. 48; 30 N.E. 88 (elevator); Taylor v. Carew Mfg. Co., 140 Mass. 150; 3 N. E. 21; 143 Mass. 470; 10 N. E. 308 (elevator-well); Lawless

§ 220. Alabama rules.—In Tutwiler Coal Co. v. Enslen (Ala.)[1] a negro boy, thirteen years of age, was killed while working as a "chainer" in the defendant's coal mine. His duties were to chain coal-cars together in a certain part of the mine, and he was killed by a rock from the roof falling upon him. The action was by the administrator for a defect in the condition of the ways, works, machinery, or plant of the defendant. One defense relied upon was contributory negligence of the deceased. The supreme court held that prima facie a child between the ages of seven and fourteen years was incapable of exercising such judgment and discretion as to render him guilty of contributory negligence, and the mere fact that the deceased was "bright, smart and industrious" was not sufficient to overcome the presumption of his want of such judgment and discretion.

In McNamara v. Logan (Ala.)[2] the plaintiff was crushed between the wall of a mine entry and a car, while he was attempting to sprag the car-wheels on a down grade. It was the first trip that plaintiff had made in the entry, and at the place where he was injured the wall was so close to passing cars as to render spragging dangerous, but plaintiff did not know this fact. One D, who had charge of the drivers, went with the plaintiff to show him where to begin spragging, which was done on the down grade by running along beside the car. When they reached the grade, D jumped off to sprag the wheels on his side, and the plaintiff jumped off on his side and, while running along beside the car attempting to sprag the wheels, he was crushed between the car and the wall. It was held that the defendant's request for a ruling that

v. Connecticut River R. Co., 136 Mass. 1 (locomotive); Slattery v. Walker & Pratt Mfg. Co., 179 Mass. 307; 60 N. E. 782 (air-hoist).

[1] 129 Ala. 336; 30 So. 600 (1901).

[2] 100 Ala. 187; 14 So. 175.

the plaintiff could not recover, because he had been guilty of contributory negligence, was properly refused by the presiding justice; that the question was at least one for the jury to determine; and that a finding for the plaintiff was justified by the evidence.

In Richmond &c. R. Co. v. Thomason (Ala.)[1] a brakeman, while attempting to uncouple two cars while in motion without using a stick, in violation of a known rule of the railroad company, was thrown between the cars and crushed, through the negligence of the locomotive-engineer in suddenly stopping and starting the train. It was held that he was guilty of contributory negligence, and that the jury should have been directed to find for the defendant in an action under the Employers' Liability Act.[2]

In Davis v. Western R. Co. (Ala.)[3] a switchman had his arm crushed in attempting to uncouple cars in a moving freight-train. A foreman to whose order the plaintiff was bound to conform ordered him to "cut off one car." There was no emergency requiring haste. The cars had double-deadwoods, and were going backwards, and were pulling on the engine so that the draw was taut. He failed to give the usual signal to the engineer to cause a slack between the cars before going between them, and when the slack came he was crushed between the deadwoods. He was a man thirty years of age, and had worked on railroads and in switching cars for about nine years, and had worked in defendant's yard for about one year. In an action under the Employers' Liability Act it was held that a verdict was properly ordered for the defendant, upon the ground that the plaintiff had been guilty of contributory negligence.

[1] 99 Ala. 471; 12 So. 273.
[2] See also, Richmond &c. R. Co. v. Free, 97 Ala. 231; 12 So. 294.
[3] 107 Ala. 626; 18 So. 173.

In Burgin v. Louisville &c. R. Co. (Ala.)[1] a brakeman jumped off the pilot of a moving engine at an unusual place for employees to alight, at which place there was a low embankment. It was dark at the time, and, although he carried his lighted lantern in one hand, he did not use it to see where he would alight. There was no necessity for his getting off at that place, and the danger was an obvious one if he had stopped to look. It was held that no ordinarily prudent man would have done such an act under the circumstances, that he was guilty of contributory negligence, and that a verdict was properly ordered for the defendant.[2]

In Louisville &c. R. Co. v. Markee (Ala.)[3] a section-foreman in charge of a hand-car was killed by a collision with a train of cars on a curve. The rules of the railroad company required curves to be flagged by section-foremen, and a constant lookout kept. The deceased, although he knew this rule, failed to flag this curve, and there was evidence that if the curve had been flagged the engineer would have had time and space sufficient to have stopped the train, and thus to have prevented the collision, both the train and the hand-car moving in the same direction. It was held in an action by his administratrix under the statute that he was guilty of contributory negligence.

As to what acts on the part of a locomotive-engineer in charge of an engine will constitute contributory negligence as matter of law on his part, so as to prevent a recovery by him or his personal representative under the Alabama statute, see Louisville &c. R. Co. v. Stutts (Ala.).[4]

[1] 97 Ala. 274; 12 So. 395.

[2] See also, Thompson v. Boston &c. R. Co., 153 Mass. 391; 26 N. E. 1070; Richmond &c. R. Co. v. Bivins, 103 Ala. 142; 15 So. 515; Southern R. Co. v. Arnold, 114 Ala. 183; 21 So. 954.

[3] 103 Ala. 160; 15 So. 511.

[4] 105 Ala. 368; 17 So. 29; 53 Am. St. 127.

§ 221. New York Employers' Liability Act, section 3.— The New York Employers' Liability Act of 1902, although it leaves the defense of contributory negligence open to the employer, contains a material modification of the power of the trial court to order a verdict for the defendant upon the ground that the undisputed evidence shows that the injured employee was guilty of contributory negligence. Section 3 of this act relates to the effect of continuing in the service with knowledge of the risk of injury, and provides: "In an action maintained for the recovery of damages for personal injuries to an employee, received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence."

A comparison of this clause with the decisions cited in the foot-note will show that this provision is a radical departure from the prior rule, under which many verdicts were ordered for the defendant, or nonsuits entered, for the reason that in the opinion of the presiding justice the plaintiff had been guilty of contributory negligence as matter of law.[1]

[1] Schulz v. Rohe, 149 N. Y. 132; 43 N. E. 420 (1896); Prenate v. Union

This matter is generally regarded as falling more properly under the defense of assumption of risk, and many cases may be found in the following chapter relating to it. In Alabama, however, it was decided in a leading case at common law that the employee's continuance in the service with knowledge of the risk of injury constituted contributory negligence,[1] though in later cases under the Employers' Liability Act this defense has usually been described as assumption of risk or Volenti non fit injuria.[2]

§ 222. Employee's death while in discharge of duty—Massachusetts cases.—In Massachusetts the fact that an employee is killed while in the discharge of his work, without proof as to what he was doing at the time, will not warrant a finding that he was in the exercise of due care, and a verdict should be ordered for the defendant, whether the action is at common law[3] or under the Employers' Liability Act.[4]

In Geyette v. Fitchburg R. Co. (Mass.)[5] a freight-brakeman on a night train was killed by falling off the train at about 4 o'clock in the morning of a dark night. The train consisted of two engines, twenty-two cars and a caboose. The deceased, while on the second engine, stated that he could not see the red light on the rear of the train, and he

Iron Co., 23 Hun (N. Y.) 528 (1881); Ehalt v. Marshall, 14 N. Y. St. 552 (1888), as stated in Eastland v. Marshall, 165 N. Y. 420, 426; 59 N. E. 202; Eaton v. New York &c. R. Co., 163 N. Y. 391; 57 N. E. 609; 14 App. Div. (N. Y.) 20; 43 N. Y. Supp. 666; McMillan v. Saratoga &c. R. Co., 20 Barb. (N. Y.) 449.

[1] Eureka Co. v. Bass, 81 Ala. 200; 8 So. 216; 60 Am. R. 314.

[2] Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; 17 So. 29; 53 Am. St. 127.

[3] Corcoran v. Boston &c. R. Co., 133 Mass. 507; Riley v. Connecticut River R. Co., 135 Mass. 292.

[4] Tyndale v. Old Colony R. Co., 156 Mass. 503; 31 N. E. 655; Irwin v. Alley, 158 Mass. 249; 33 N. E. 517; Felt v. Boston &c. R. Co., 161 Mass. 311; 37 N. E. 375.

[5] 162 Mass. 549; 39 N. E. 188.

started out to ascertain if the train had broken apart. As a matter of fact, the train had previously broken apart. He was not seen alive after he left the engine, and his dead body was found in the center of the track between the rails. There were indications that he struck on his feet between the tracks and was run over by the rear part of the train. In an action under the Employers' Liability Act it was held that the evidence failed to show that the deceased was in the exercise of due care, and that a verdict for the defendant was properly ordered by the presiding justice.

But where the evidence shows that the deceased was in the performance of his duty shortly before the accident, and that the circumstances did not call for any positive act of care on his part in reference to the force which caused the accident, a finding of due care will be justified, and the case should not be withdrawn from the jury.[1]

Likewise, when the deceased was performing his duty at the time of the injury, and was injured by a defect or breach of duty which had arisen or occurred suddenly without his knowledge, the question of his due care is generally one for the jury. Thus, in Gustafsen v. Washburn & Moen Mfg. Co. (Mass.)[2] an employee was killed by falling into a ditch across a railroad-track on the defendant's premises while he was assisting in pulling a loaded car along the track. The ditch had been dug on the morning of the accident, and no warning had been given to the deceased, or to the other employees who had formerly used the track. The operation of pulling the car required the men to lean forward and bend down their heads. There was no direct evidence that the deceased knew of

[1] Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425, as explained in Geyette v. Fitchburg R. Co., 162 Mass. 549, 551; 39 N. E. 188; Caron v. Boston &c. R. Co., 164 Mass. 523; 42 N. E. 112; Houlihan v. Connecticut River R. Co., 164 Mass. 555; 42 N. E. 108.

[2] 153 Mass. 468; 27 N. E. 179.

the existence of the ditch. In an action under the Massachusetts act, it was held that it was a question for the jury to determine whether the deceased was in the exercise of due care at the time of his injury.

In Mears v. Boston &c. R. Co. (Mass.)[1] a car-inspector was instantly killed by being crushed by a freight-car while he was inspecting another car in the course of his duty in the defendant's employ. A car had been "kicked" off from a freight-train, and sent down a descending grade on a track without a brakeman, contrary to a rule of the railroad. It struck two box-cars which had been left standing on the track in such a position as to cut off from the view of the deceased the approaching car, and he had no notice that a car would be kicked off and sent down the track in that manner. It was held, in this action under the statute by his widow, that there was sufficient evidence of due care on his part to require the submission of the case to the jury, and that the trial judge erred in directing a verdict for the defendant.

In McLean v. Chemical Paper Co. (Mass.)[2] the failure of the deceased to notify the fireman in charge of a steam-boiler that he was going into a manhole connected with the boiler was held to be contributory negligence, and to justify a direction to find for the defendant.

§ 223. Same—Alabama cases.—In Alabama the burden of proving contributory negligence rests upon the defendant, and when there is no proof of such negligence the plaintiff is entitled to go to the jury upon this question, and a verdict should not be ordered for the defendant because the plaintiff has not shown that he was in the exercise of due care and diligence at the time of the injury. In this respect the Alabama rule differs

[1] 163 Mass. 150; 39 N. E. 997.
[2] 165 Mass. 5; 42 N. E. 330.

radically from that of Massachusetts, and the difference is very apparent in the class of cases now under consideration.

In Bromley v. Birmingham &c. R. Co. (Ala.)[1] a freight-brakeman fell off his train while in motion, and was run over and killed. No one saw him fall, and there was no evidence as to the circumstances immediately preceding his death. Shortly before his death, the train separated into two parts, and it then became his duty to at once apply the brakes. He was last seen alive standing on the top of a rear car near the brake, and a few moments afterwards his body was found between the rails, crushed by the car. The car had a large hole in the top, near the brake. The conductor knew of this hole, and it was obvious to any one in the daylight. In an action under the Alabama statute by his administrator, it was held that the plaintiff was entitled to go to the jury, both upon the question of due care and upon the question that there was a defect in the car which caused his death. In delivering the court's opinion, Mr. Justice Coleman says, on page 399: "If the facts and circumstances proven are such that a jury would be authorized to legally infer that deceased was engaged in the performance of his duties as brakeman; that the hole in the top of the box-car was the proximate cause of the injury; and if there was no evidence of contributory negligence, then the court was not authorized to give the general charge for the defendant, but under such proof the question should have been submitted to the jury. If, however, the facts proven leave the question as to what caused the injury wholly in conjecture, as distinguished from legal inference, there was nothing to submit to a jury. The burden is upon the plaintiff to make out his case. He must not only aver and prove both an injury and negligence, but he must

[1] 95 Ala. 397; 11 So. 341.

go further and establish a proximate causal connection between the injury and the negligence."

On page 405 the same learned justice says, after reviewing the cases from several other states: "There must be some proof or circumstance to show that the negligence caused the injury, and the presumption that no one will contribute to his own injury can not take the place of such evidence. It is not necessary that there be an eyewitness, if there are other circumstances which tend to show that the defect in the top of the car caused the fall; and if these were shown, the general charge should not have been given. Considering the character of the hole, its location with regard to the location of the brakes, the duty to be performed in setting up brakes, the fact that the brakeman was last seen alive at this point where his duty called him, that he fell and was run over by the cars—taking into consideration these attending circumstances, we can not say that there was no evidence from which an inference might not be legally drawn by a jury that the defect caused the injury. We think, under all the facts proven, that the question should have been referred to the jury."

In Nave v. Alabama &c. R. Co. (Ala.)[1] the plaintiff's intestate, a boy fifteen years of age, was killed by a southbound train. He had been stationed at the place of injury to signal north-bound trains to stop, in order to protect a gang of men who were laying steel rails on the track about a mile to the north of him. He was killed about ten o'clock in the morning. The track was straight for half a mile, and he had an unobstructed view of it and of the approaching train. No warning of the train's approach was given. The defendant's evidence tended to show that the deceased was asleep, lying with his body extending down into a ditch, and in such a position that

[1] 96 Ala. 264; 11 So. 391.

he could not be seen until the train was within a few feet of him. In an action under the Alabama act, it was held that the deceased was guilty of contributory negligence, and that a verdict was properly ordered for the defendant. The court stated that it had not considered the defendant's evidence in reaching its conclusion.[1]

An employee of a railroad company working in a branch of the service other than operating trains, who stops and talks on a railroad crossing, is guilty of contributory negligence and can not recover damages for injuries inflicted by a passing train, because the law imposes no greater duty upon the defendant toward such employee than that due to any other person crossing its track.[2]

§ 224. Indiana and elsewhere—Death while in discharge of duty.—In 1851 the rule was established in Indiana that the plaintiff must allege and prove that he was without fault, or free from contributory negligence, and this rule remained in force until it was changed by the legislature in 1899.[3]

This rule applied to actions for injuries to the person by negligence, as well as to injuries to property. When death ensued immediately or shortly after the accident, or when the plaintiff's mind or memory was affected by his injury, it was often impossible to prove that the plaintiff or deceased was free from negligence. This hardship

[1] See also, McDonald v. Alabama &c. R. Co., 123 Ala. 227; 26 So. 165 (1899).

[2] Tennessee Coal &c. R. Co. v. Hansford, 125 Ala. 349; 28 So. 45 (1900).

[3] President &c. v. Dusouchett, 2 Ind. 586; 83 Am. D. 346 (1851); Riest v. City of Goshen, 42 Ind. 339, 341; Cincinnati &c. R. Co. v. Butler, 103 Ind. 31, 40; 2 N. E. 138; City of Bedford v. Neal, 143 Ind. 425; 41 N. E. 1029; 42 N. E. 815; Cincinnati &c. R. Co. v. Howard, 124 Ind. 280, 284; 24 N. E. 892; 19 Am. St. 96; 8 L. R. A. 593; Sale v. Aurora Turnpike Co., 147 Ind. 324, 330; 46 N. E. 669 (1897).

has been pointed out by the supreme court of Indiana, and by Judge Thompson and others.[1]

By the act of February 17, 1899, Indiana changed the rule of pleading and evidence which had prevailed for many years in that state, and declared that in all actions for personal injuries or death occasioned by negligence, the plaintiff need not allege or prove the want of contributory negligence, and that contributory negligence shall be a matter of defense, and may be proved under an answer of general denial. The supreme court has held this statute to be constitutional,[2] but has not yet decided what effect it has on actions under the Employers' Liability Act, which gives a right of action to an employee injured in the service, "the employee so injured being in the exercise of due care and diligence."

In Pittsburgh &c. R. Co. v. Martin (Ind.)[3] it was held that due care on the part of a railroad employee, while discharging his duties, does not require him, as matter of law, to stop, look or listen for approaching trains. The cases of travelers are inapplicable. In NewYork &c. R. Co. v. Ostman (Ind.)[4] a locomotive-fireman who leaned out of the window of his cab so far as to strike his head against a cattle-shute which was placed thirteen inches from the cab window, was held guilty of contributory negligence as matter of law, though he was discharging his duties at the time and was looking backward for signals.

In American Carbon Co. v. Jackson (Ind.)[5] it was held

[1] Indianapolis St. R. Co. v. Robinson, 157 Ind. 232; 61 N. E. 197, 199 (1901); 1 Thomp. Neg. (2d ed.), §§ 395–398.

[2] Indianapolis St. R. Co. v. Robinson, 157 Ind. 232; 61 N. E. 197 (1901).

[3] 157 Ind. 216, 227; 61 N. E. 229 (1901).

[4] 146 Ind. 452; 45 N. E. 651 (1896).

[5] 24 Ind. App. 390; 56 N. E. 862 (1899).

as matter of law that an employee of mature years who voluntarily uses a ladder which is too short to reach the place desired, when there is a longer ladder near by, is guilty of contributory negligence, and can not recover under the Indiana Employers' Liability Act.

A like rule prevails in actions at common law in Indiana, whenever the employee uses an obviously defective or unsuitable tool, without specific orders as to the time or manner of using it.[1]

In Texas &c. R. Co. v. Gentry[2] a locomotive-engineer in the defendant's employ was killed at night while crossing the defendant's railroad-track to go to his work, by being run over by a flat-car attached to a locomotive and pushed in front of the locomotive for the purpose of switching the cars. No witness saw the accident, and there was no evidence as to what the deceased was doing at the time of the accident or as to whether he stopped and listened for coming trains before attempting to cross the track or not. It was held that the law presumed that the deceased did stop and look for coming trains before crossing, and that a request to order a verdict for the defendant was properly refused by the trial court.

In Baltimore &c. R. Co. v. Petersen (Ind.)[3] a track-repairer, while at work in the defendant's switch-yard, was killed by a train backing down upon him. It was held that the rule which requires a traveler to look and listen before crossing a railroad-track does not apply to a workman engaged in the line of his work, and that failure of the deceased to do these acts did not constitute contributory negligence or prevent a recovery against his employer.

[1] Jenney Electric Light Co. v. Murphy, 115 Ind. 566; 18 N. E. 30 (1888).

[2] 163 U. S. 353; 16 S. Ct. 1104.

[3] 156 Ind. 364; 59 N. E. 1044 (1901).

A. Defects in the Ways, Works, Machinery, or Plant.

§ 225. Preliminary observations and subdivisions of chapter.—In so far as the defense of assumption of risk relates to defects in the condition of ways, works, machinery, or plant, the Employers' Liability Acts have not changed the common-law rules upon the subject; the common-law liability of the employer is neither enlarged nor lessened by the statutes upon the question of assuming the risk of such defects, but remains precisely the same, except in New York under the act of 1902, chapter 600. In a case of this nature brought under the Massachusetts act, with a count at common law, the court, by Mr. Justice Lathrop, expressly says: "On the question whether the plaintiff took the risk, there is no difference whether the action is brought at common law or under the statute of 1887, ch. 270."[1] A like principle applies to the maxim Volenti non fit injuria.

After reviewing some of the English and Massachusetts decisions, the Alabama court says, in Birmingham R. Co. v. Allen, just cited, per Mr. Justice Coleman: "It is very clear that, so far as the authorities outside of this state go, the rule declared in the case of Eureka Co. v. Bass (Ala.)[2] was not abolished by the Employers' Liability Act. Possibly it was somewhat modified, but, as we understand the rule Volenti non fit injuria as applied in the particular cases cited from the English and Massachusetts courts, there has been in fact no material modification."

A like rule prevails in Indiana.[3]

[1] Cassady v. Boston &c. R. Co., 164 Mass. 168, 170; 41 N. E. 129. See also, O'Maley v. South Boston Gas Light Co., 158 Mass. 135; 32 N. E. 1119; Gleason v. New York &c. R. Co., 159 Mass. 68; 34 N. E. 79; Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457; Smith v. Baker, (1891) A. C. 325.

[2] 81 Ala. 200; 8 So. 216; 20 L. R. A. 457.

[3] Whitcomb v. Standard Oil Co., 153 Ind. 513; 55 N. E. 440.

In New York, however, the Employers' Liability Act of 1902 has made a decided change in the law upon this subject, and has much enlarged the rights of employees and the liabilities of employers. The risks which an employee assumes are declared by section 3 of this statute to be only those "inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees."

The New York act further provides by section 3 that the question of whether the injured employee assumed the risk by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, and that such knowledge and conduct on his part shall not, as a matter of law, be considered as an assent thereto or an assumption thereof.

In Island Coal Co. v. Greenwood (Ind.)[1] an important distinction upon the question of assumption of risk was pointed out by Chief Justice Howard for the court (pp. 483, 484). If the furnishing or preparation of the structure or appliance is itself part of the work which the injured employee or his fellow servants are employed to perform, the plaintiff will be held, as matter of law, to assume many risks which he would not be held to assume if the structure or appliance had been furnished by the employer for the work in hand.[2]

The measure of the employer's duty is considerably higher when he furnishes the injured employee a place to work in, or a tool or machinery to work with, than when

[1] 151 Ind. 476; 50 N. E. 36 (1898).

[2] See also, Corson v. Coal Hill Co., 101 Iowa 224; 70 N. W. 185; Louisville &c. R. Co. v. Howell, 147 Ind. 266; 45 N. E. 584; Swanson v. City of Lafayette, 134 Ind. 625; 33 N. E. 1033; Finalyson v. Utica Mining &c. Co., 67 Fed. 507; 14 C. C. A. 492; Moon-Anchor Mines v. Hopkins, 111 Fed. 298 (Colorado death act)

the injured employee agrees or undertakes to prepare the place, or to repair the tool or machinery, especially when this is a part of his regular work. In the latter case the defense of assumption of risk is very strong in actions under the Employers' Liability Acts as well as at common law. If the injured employee knew of the defect or danger in question, or by the exercise of due care might have known of it, his conduct becomes the intervening and proximate cause of his injury, and he is deemed as matter of law to assume the risk. With respect to such an employee, the duty of the employer has reached its vanishing point in ordinary cases.[1]

In the Indiana case of Eureka Block Coal Co. v. Wells (Ind.)[2] it was ruled that the risks which a coal miner assumes are only those risks which remain after the employer has performed all the duties which the law imposes upon the employer for the safety of his employees; and it was accordingly held, where the wall between places in which coal was mined became so thin that a charge of powder used in mining blew the wall out and injured the plaintiff, that the mine-owner had failed to furnish a reasonably safe place to work, and that the plaintiff had not assumed the risk, especially as the mining-boss had failed to visit and examine the wall as often as required by statute.

With respect, however, to injuries caused by the negligence of a superintendent, or, when the action is against a railroad company, by the negligence of a person having the "charge or control" of certain appliances, the Employers' Liability Acts have either entirely abolished, or at least materially modified, the doctrines of assumption of risk and Volenti non fit injuria, and have thereby

[1] Mellor v. Merchants' Mfg. Co., 150 Mass. 362; 23 N. E. 100; 5 L. R. A. 792.

[2] 29 Ind. App. 1; 61 N. E. 236 (1901).

greatly enlarged the rights of employees and the liabilities of employers.[1]

The subject will be discussed under the following subdivisions:

A. Defects in the ways, works, machinery or plant.

B. Negligence of a superintendent.

C. Negligence of one having the charge or control of a signal, switch, locomotive-engine, or train upon a railroad.

D. Negligence of person to whose orders plaintiff was bound to conform.

§ 226. Definitions and illustrations.—Volenti non fit injuria: "That to which a person assents is not esteemed in law an injury."[2]

In Smith v. Baker,[3] Lord Watson says: "The maxim, Volenti non fit injuria, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave in order that he might share in the price, suffered a serious injury, but he was in the strictest sense of the term 'volens.' The same can hardly be said of a slater who is injured by a fall from the roof of a house, although he too may be volens in the sense of English law. In its application to questions between the employer and the employed, the maxim as now used generally imports that the workman had, either expressly or by implication, agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform, and from which he had suffered injury."

In O'Maley v. South Boston Gas Light Co. (Mass.),[4] Mr. Justice Knowlton says: "The doctrine of assumption of the risk of his employment by an employee has

[1] Post, §§ 246–249.

[2] Broom Legal Maxims, star page 268.

[3] (1891) A. C. 325, 355.

[4] 158 Mass. 135, 136; 32 N. E. 1119.

usually been considered from the point of view of a contract, express or implied; but as applied to actions of tort for negligence against an employer, it leads up to the broader principle expressed by the maxim Volenti non fit injuria. One who, knowing and appreciating a danger, voluntarily assumes the risk of it, has no just cause of complaint against another who is primarily responsible for the existence of the danger. As between the two, his voluntary assumption of the risk absolves the other from any particular duty to him in that respect, and leaves each to take such chances as exist in the situation, without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the danger. If there is a failure to do his duty according to a high standard of ethics, there is, as between the parties, no neglect of legal duty."

"The doctrine of Volenti non fit injuria stands outside the defense of contributory negligence and is in no way limited by it. In individual instances the two ideas seem to cover the same ground; but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies when there has been no carelessness at all."[1] If the undisputed facts show that the plaintiff has assumed the risk, a verdict should be directed for the defendant, even if they also show that he has exercised due care and diligence.[2]

In Goodes v. Boston &c. R. Co. (Mass.)[3] the court, speaking through Mr. Justice Morton, says: "One entering the employment of another assumes the obvious risks arising from the nature of the employment, from

[1] Thomas v. Quartermaine, 18 Q. B. D. 685, 697, 698, per Bowen, L. J. See also, McPhee v. Scully, 163 Mass. 216, 217; 39 N. E. 1007.

[2] Mellor v. Merchants' Mfg. Co., 150 Mass. 362; 23 N. E. 100; 5 L. R. A. 792; Stuart v. West End R. Co., 163 Mass. 391; 40 N. E. 180.

[3] 162 Mass. 287, 288; 38 N. E. 500.

the manner in which the business is carried on, and from the condition of the ways, works and machinery, if he is of sufficient capacity to understand and appreciate them. It is not necessary to inquire whether this doctrine rests upon contract, or upon the inherent reasonableness and justice of the rule itself, as applied to the relations of master and servant. It has been long and well settled at common law, and it is not contended by the plaintiff that it does not apply to cases arising under the Employers' Liability Act, so called."

Nearly all the authorities agree that mere knowledge of the risk on the part of the employee is not sufficient to prevent a recovery under the statute.[1] The maxim is not Scienti non fit injuria, but Volenti non fit injuria. The test is not merely whether the injured employee knew of the risk, but whether the circumstances are such as necessarily to lead to the conclusion that the whole risk was voluntarily incurred by him. If not, the question should be submitted to the jury.[2]

The common-law rule is of like nature.[3]

§ 227. Continuance in defendant's employ with knowledge of the risk—(1) English rule.—Great difference of

[1] Smith v. Baker, (1891) A. C. 325, 337; Thomas v. Quartermaine, 18 Q. B. D. 685, 696; Yarmouth v. France, 19 Q. B. D. 647; Mellor v. Merchants' Mfg. Co., 150 Mass. 362, 364; 23 N. E. 100; 5 L. R. A. 792. Contra, Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457 (overruling Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146).

[2] Cases cited above.

[3] Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155; 29 N. E. 464; 31 Am. St. 537; Mahoney v. Dore, 155 Mass. 513; 30 N. E. 366; Rooney v. Sewall &c. Cordage Co., 161 Mass. 153; 36 N. E. 789; Ford v. Fitchburg R. Co., 110 Mass. 240; 14 Am. R. 598; Hough v. Railway Co., 100 U. S. 213; Hawley v. Northern Cent. R. Co., 82 N. Y. 370; Indianapolis &c. R. Co. v. Ott, 11 Ind. App. 564; 38 N. E. 842; 39 N. E. 529; Dorsey v. Phillips Co., 42 Wis. 583; Flynn v. Kansas City &c. R. Co., 78 Mo. 195; 47 Am. R. 99. Contra, Eureka Co. v. Bass, 81 Ala. 200; 8 So. 216; 60 Am. R. 152.

opinion has developed upon the question whether or not the plaintiff's continuance in the employ of the defendant, with knowledge of the defect or negligence which ultimately causes his injury, will, as matter of law, prevent a recovery under the Employers' Liability Act. Does he thereby assume the risk of injury; or does he consent to or voluntarily incur the risk so as to preclude a recovery as matter of law under the maxim Volenti non fit injuria? Or, on the other hand, is such continuance with knowledge of the risk merely one of the facts bearing upon the right of action which should be submitted to the jury under proper instructions? May the jury find on all the evidence that the plaintiff continued at work, not because he consented to incur the risk, but because the necessity of his pecuniary condition constrained him to remain?

In Smith v. Baker,[1] the leading case under the English act of 1880, these questions were fully considered by the house of lords. In that case the defendants were railway-contractors, and had taken a contract to open a railway-cut. The plaintiff was employed by them to drill holes in the rock. While he was engaged in the operation of drilling, a stone fell out of a crane above him and caused the injuries complained of. The crane had been worked in the same way over his head for several months before his injury, and he understood the risk of continuing to work. There was no one to warn him when the crane was coming towards him, and it was operated by other employees of the defendant. The county court refused to nonsuit the plaintiff on the ground requested by the defendant, that the plaintiff had assumed the risk and could not recover under the doctrine of Volenti non fit injuria. The case was submitted to the jury, and a verdict for the plaintiff was returned. It was held that the question was

[1] (1891) A. C. 325.

one of fact and not of law; that by continuing in the service with knowledge and understanding of the risk, the plaintiff had not thereby assumed the risk in the sense of preventing a recovery as matter of law; that the maxim Volenti non fit injuria did not apply; and that the verdict was warranted by the evidence. Considerable stress was laid upon the fact that there was no inherent danger in the plaintiff's work of drilling, and that his injury had been caused by a defect in the machinery used in another department over which he had no control. On page 357, referring to cases in which the work is not intrinsically dangerous, but is rendered dangerous by some defect which it was the duty of the employer to remedy, Lord Watson says: "The risk may arise from a defect in a machine, which the servant has engaged to work, of such a nature that his personal danger and consequent injury must be produced by his own act. If he clearly foresaw the likelihood of such a result, and notwithstanding continued to work, I think that, according to the authorities, he ought to be regarded as volens. The case may be very different when there is no inherent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no control. The present case belongs to that category. There was no intrinsic danger in the operation of drilling in which the plaintiff was engaged; the peril from which he suffered was not evoked by his act, but was brought into contact with him by workmen employed in a different operation."

The clause contained in the various acts to the effect that no recovery can be had if the employee knew of the defect or negligence which caused his injury and failed to give information thereof within a reasonable time, was deemed by Lord Watson to show that the legislature did

not intend that an employee, by merely continuing in the service with knowledge of the defect or negligence, should thereby lose the right to recover damages which he would otherwise have possessed.[1]

Lord Halsbury, L. C., in his opinion in this case says, on page 336: "For my own part, I think that a person who relies on the maxim must show a consent to the particular thing done. Of course, I do not mean to deny that a consent to the particular thing may be inferred from the course of conduct, as well as proved by express conduct; but if I were to apply my proposition to the particular facts of this case, I do not believe that the plaintiff ever did or would have consented to the particular act done under the particular circumstances. He would have said: 'I can not look out for myself at present. You are employing me in a form of employment in which I have not the ordinary means of looking out for myself;. I must attend to my drill. If you will not give me warning when the stone is going to be slung, at all events let me look out for myself, and do not place me under a crane which is lifting heavy stones over my head when you keep my attention fixed upon an operation which prevents me looking out for myself.'"

Again, on page 338, Lord Halsbury says: "As I have intimated before, I do not deny that a particular consent may be inferred from a general course of conduct. Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The act is his own, and he can not be said not to consent to the thing which he himself is doing. And examples might be indefinitely multiplied where the essential cause of the risk is the act of the complaining plaintiff himself, and where, therefore, the application of the maxim Volenti non fit injuria is completely justified."

[1] Smith v. Baker, (1891) A. C. 325, 355, 356.

§ 228. Same—Same.— In Yarmouth v. France[1] the plaintiff, while in the employ of the defendant as a driver, was kicked by a vicious horse. He knew the horse to be vicious, and had complained of it many times to the defendant's foreman. The foreman told him to go on driving the horse, and that if any accident happened to the plaintiff the employer would be responsible. In an action under the English Employers' Liability Act, it was held by a majority of the court (Lopes, L. J., dissenting) that the fact that the plaintiff remained in the defendant's employ, with knowledge and appreciation of the risk of injury from the horse, did not show as matter of law that he had voluntarily incurred the risk, so as to prevent a recovery under the maxim Volenti non fit injuria; that the question was one of fact for the jury to determine; and that the jury would have been justified in finding for the plaintiff.

Lindley, L. J., says on page 661: "If nothing more is proved than that the workman saw danger, reported it, but, on being told to go on, went on as before, in order to avoid dismissal, a jury may in my opinion properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred."

In the much-discussed case of Thomas v. Quartermaine,[2] the plaintiff was scalded by falling into a cooling-vat in the defendant's brewery while he was pulling a board from under an adjacent boiling-vat. He was employed in the cooling-room, in which there was a cooling-vat and a boiling-vat, between a part of which the passageway was only three feet wide. The cooling-vat had a rim of sixteen inches above the passage, but it was not fenced or railed

[1] 19 Q. B. D. 647.
[2] 18 Q. B. D. 685.

in. A board which was used as a lid to the cooling-vat being under the boiling-vat, the plaintiff took hold of it to pull it out; the board stuck; the plaintiff gave a harder pull and the board came out suddenly, causing the plaintiff to fall back into the cooling-vat. He had worked in the room for many months, and knew its condition as well as the defendant. In an action under the Employers' Liability Act for failure to fence the vat, it was held by Bowen and Fry, L. JJ. (Lord Esher, M. R., dissenting), that the maxim Volenti non fit injuria applied to the case, and that therefore there was no sufficient evidence of negligence to warrant a finding for the plaintiff, and the defendant was entitled to judgment. In the opinion of Bowen, L. J., after stating that mere knowledge of the danger by the plaintiff is not a conclusive defense in itself, he adds on page 697: "But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defense seems to me complete."

If Thomas v. Quartermaine[1] decides that the mere fact that the plaintiff continues to work on the defendant's premises after he knows their defective condition is conclusive evidence of his assumption of the risk, and precludes a recovery under the act, although there has been a breach of duty on the defendant's part, the decision can scarcely be reconciled with Smith v. Baker[2] and others. It seems possible, however, to reconcile it with Smith v. Baker on the ground that there was no negligence on the part of the defendant. Bowen, L. J., states, near the conclusion of his opinion, on page 699: "There was, therefore, in my opinion, no evidence of negligence on which the county court judge could act, and therefore the appeal should be dismissed with costs." And on pages

[1] 18 Q. B. D. 685.
[2] (1891) A. C. 325.

702, 703, Fry, L. J., says: "For the reasons I have given I think that there was no negligence of the defendant from which the defect arose, or which was the cause of its not being discovered or remedied; and on this ground I think the defendant is not liable. * * * Further, I think that on the whole of this case there was no evidence to support the finding of the county court judge that there was a defect in the ways due to the negligence of the defendant."

Other parts of the opinions, however, strongly support the view adopted by the reporter in his head-note, namely, that there was no sufficient evidence to warrant a finding of defendant's negligence, *because* the doctrine of Volenti non fit injuria applied to the case, thus confounding two matters which were held in Smith v. Baker[1] to be separate and distinct defenses. If there was not sufficient evidence of the defendant's negligence, that ended the case in his favor, and it was unnecessary to consider the other defense founded upon the maxim.

In Baddeley v. Granville[2] it was decided that where the injury is caused by the breach of an express statutory duty on the defendant's part, as failure to keep a man at the mouth of a coal-pit, the doctrine of Volenti non fit injuria does not apply to actions under the Employers' Liability Act.

Weblin v. Ballard[3] goes too far in holding that the English act has entirely abolished the common-law defense of assumption of risk for an injury caused by a defect in the condition of the ways, works, etc., though the ruling that it has abolished the defense of common employment, as applied to the persons mentioned in the act, has been sustained by the later decisions.

[1] (1891) A. C. 325.
[2] 19 Q. B. D. 423.
[3] 17 Q. B. D. 122.

§ 229. Assumption of risk arising from omission of specific statutory duty.—Upon this subject, irrespective of express statute, there exists considerable conflict of authority. In some jurisdictions it is held broadly that an employer's omission to comply with a specific statutory duty imposed upon the employer for the benefit of his employees, such, for example, as the duty to guard or fence machinery, may be waived or lost by the employee by continuing to work with knowledge of the defect or danger.[1]

On the other hand, it has been held by other courts that the doctrine of assumption of risk has no application whatever to the case of a breach of a specific statutory duty imposed upon the employer, and the fact that the plaintiff continues in the defendant's employ with knowledge of the breach and without objection will not prevent his recovery under the Employers' Liability Act.[2]

In many of these cases the distinction which has been taken in Massachusetts has been overlooked. That distinction seems to be this: When the employer's omission to comply with the specific statutory duty is the sole proximate cause of his employee's injury, the plaintiff does not assume the risk or waive any of his rights by continuing to work with knowledge of the statutory breach, but may recover for an injury so caused. When, however, the employer's omission to comply with the statute

[1] Knisley v. Pratt, 148 N. Y. 372; 42 N. E. 986 (1896); Graves v. Brewer, 4 App. Div. (N. Y.) 327; 38 N. Y. Supp. 566; E. S. Higgins Carpet Co. v. O'Keefe, 79 Fed. 900; 25 C. C. A. 220 (1897).

[2] Baddeley v. Granville, 19 Q. B. D. 423; Groves v. Wimborne, (1898) 2 Q. B. 402; Britton v. Great Western Cotton Co., L. R. 7 Ex. 130, 136; Monteith v. Kokomo &c. Co., 159 Ind. —; 64 N. E. 610 (1902); D. H. Davis Coal Co. v. Polland, 158 Ind. —; 62 N. E. 492 (1902); Island Coal Co. v. Swaggerty, 159 Ind. —; 62 N. E. 1103 (1902); Buehner Chair Co. v. Feulner, 28 Ind. App. 479; 63 N. E. 239 (1902); Spring Valley Coal Co. v. Rowatt, 196 Ill. 156; 63 N. E. 649 (1902); Narramore v. Cleveland &c. R. Co., 96 Fed. 298; 37 C. C. A. 499; Borck v. Michigan Bolt Works, 111 Mich. 129; 69 N. W. 254; Ashman v. Flint &c. R. Co., 90 Mich. 567; 51 N. W. 645.

is not the immediate, proximate cause of the plaintiff's injury, and the plaintiff's negligence or that of some third party has contributed to the injury, and is nearer to the event, the plaintiff can not recover as a matter of law if he continued to work with full knowledge and appreciation of the danger. A good illustration of this Massachusetts doctrine is contained in the case of Keenan v. Edison Electric &c. Co. (Mass.).[1] In this case the plaintiff's work was to take a car loaded with coal in an elevator from the lower floor to the roof of a building, to push the car a short distance along a track on the roof, dump the contents of the car, and push it back and take it down on the elevator. The statute of 1885, chapter 377, section 110, required elevator-shafts to be protected by an automatic guard. This elevator-shaft was not so protected, and the plaintiff had worked in this place for several weeks before his accident. The accident occurred by the plaintiff pushing the car into the elevator-shaft, supposing the elevator to be where he had left it a short time before, but the elevator had gone down without his knowledge, and he fell into the shaft and was injured. It did not appear who moved the elevator. The court held that the defendant was negligent toward the plaintiff in failing to provide an automatic guard to the shaft, but held that a verdict was nevertheless properly directed for the defendant on the ground that there was no evidence that the defendant was responsible for the elevator-car having been moved, and the plaintiff knew as well as the defendant that there was no guard to the shaft and understood that if the elevator-car was not there when he pushed his coal-car into the well his car would tumble down the hole. "In other words," said Mr. Justice Holmes for the court, "the plaintiff appreciated the danger so far as the defendant contributed to it. Although very possibly a guard would have prevented the injury, the plaintiff's

[1] 159 Mass. 379; 34 N. E. 366.

conduct was nearer to the event. He did not rely upon any such preventive, but took the chances of the elevator-car being where he left it" (p. 382). In this case the immediate and principal cause of the accident was the act of lowering the elevator, and it was not shown that the defendant was responsible to the plaintiff for this act. This distinction has also been acted upon in New York.[1]

On the other hand, if the employer's ways, works, or machinery are rendered defective and unsafe by his omission to comply with the statute, the circumstance that the negligence of a coemployee has contributed to the plaintiff's injury will not prevent his recovery. In Cayzer v. Taylor,[2] the plaintiff was scalded by steam from a steam-boiler owned and used by the defendant in his factory. The boiler was unprovided with a fusible safety-plug, required by the Massachusetts Statute 1852, chapter 247, and the engineer in charge of the boiler fastened down the safety-valve and loaded the lever with weights, and subjected the boiler to high pressure. It was held that a verdict for the plaintiff, a fellow servant with the engineer, was properly returned. So, also, if the plaintiff's negligence is nearer to the accident and contributes to his injury, the court should direct a verdict for the employer, although the latter's violation of an express statutory duty has also contributed to the plaintiff's injury.[3]

In Baddeley v. Granville,[4] the Coal Mines Regulation Act, 1872, required a banksman to be kept at the mouth of a coal-pit while the miners were going up or down the

[1] Stewart v. Ferguson, 34 App. Div. (N. Y.) 515; 54 N. Y. Supp. 615 (1898).

[2] 10 Gray (Mass.) 274; 59 Am. D. 317.

[3] Taylor v. Carew Mfg. Co., 143 Mass. 470; 10 N. E. 308; Dieboldt v. United States Baking Co., 72 Hun (N. Y.) 403; 25 N. Y. Supp. 205; St. Louis &c. R. Co. v. Mathias, 50 Ind. 65; Bodell v. Brazil Block Coal Co., 25 Ind. App. 654; 58 N. E. 856; Borck v. Michigan Bolt &c. Works, 111 Mich. 129; 69 N. W. 254.

[4] 19 Q. B. D. 423.

shaft. The plaintiff's husband was killed while coming out of the shaft at night, through an improper signal given by a boy to the engineer in charge of the cage, no banksman being present as required by the statute. In an action under the Employers' Liability Act, 1880, it was held that the fact that the deceased knew that no banksman was employed by the defendant at night, and continued to work at the mine, did not constitute a defense to the action. Wills, J., says on pages 426, 427: "An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation people may come to what agreements they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of Volenti non fit injuria is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to. On that ground there is much to be said in favor of the opinion expressed in the court of appeal that, where there has been a breach by a defendant of a statutory obligation, the maxim, Volenti non fit injuria, has no application."[1]

In Indiana it is now settled that an employee's contin-

[1] Referring to Thomas v. Quartermaine, 18 Q. B. D. 685. See also, Blamires v. Lancashire &c. R. Co., L. R. 8 Ex. 283.

uance at work with knowledge of his employer's breach of a specific statutory duty constitutes no defense.[1]

In Baltimore &c. R. Co. v. Peterson (Ind.)[2] it was decided that a railroad-employee, by accepting service, does not assume the risk of injury arising from the non-observance by the railroad company of a city ordinance requiring the maintenance of a watchman on the rear of a backing train and the ringing of the engine-bell. In Bodell v. Brazil Block Coal Co. (Ind. App.)[3] it was held that a coal miner assumes the risk of danger from falling coal, due to the negligence of his employer in providing a defective or insufficient covering to a cage, under which he worked, although there was a statute in force requiring cages in mines to be securely covered. The contrary, however, has been decided in Missouri and Illinois.[4]

In Ornamental Iron &c. Co. v. Green (Tenn.)[5] a boy under twelve years of age, while in the employ of the defendant, received personal injuries for which this action was brought. It was provided by a Tennessee statute of 1893[6] that it should be unlawful for any proprietor, foreman, owner or other person to employ any child less than twelve years of age in any workshop, mill, factory or mine in that state, and imposed a penalty for such employment. It was held that the mere employment of an infant under twelve years of age constituted per se such negligence as made the employer liable for all injuries sustained by the infant in the course of his employment. "The very employment is a violation of

[1] Monteith v. Kokomo &c. Co., 159 Ind. —; 64 N. E. 610 (1902), reviewing the authorities.

[2] 156 Ind. 364; 59 N. E. 1044.

[3] 25 Ind. App. 654; 58 N. E. 856 (1900).

[4] Durant v. Lexington Coal Co., 97 Mo. 62; 10 S. W. 484; Litchfield Coal Co. v. Taylor, 81 Ill. 590.

[5] (Tenn.) 65 S. W. 399 (1901).

[6] Shannon's Code, § 4434.

the statute," says Mr. Justice Beard, "and every injury that results therefrom is actionable. In the case presented by the plaintiff below, as well as in that adduced by the defendant company, the connection between the employment and the injury is that of cause and effect, and brings the complaint within the operation of the statute." To the same effect is the case of Queen v. Iron Co. (Tenn.).[1]

§ 230. Assumption of risk under New York Employers' Liability Act of 1902—Statutory defects in New York.—Section 3 of the New York act declares that:

"Section 3. An employee by entering upon or continuing in the service of the employer shall be presumed to have assented to the necessary risks of the occupation or employment and no others. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect, be considered as including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action maintained for the recovery of damages for personal injuries to an employee received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such employee, or after he had been informed of the danger of personal injury therefrom, shall not as a matter of law be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury.

[1] 95 Tenn. 458; 32 S. W. 460.

The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence by his continuance in the same place and course of employment with knowledge of the risk of injury, shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. An employee or his legal representative shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of the employer, who had entrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer or superior person prior to such injuries to the employee."

Upon the above points the common law of New York was the opposite. In Knisley v. Pratt (N. Y.)[1] the plaintiff, a woman, while in the defendant's employ, was injured by reason of the absence of guards on the cogwheels of a punching-machine, which she was cleaning while in motion. The New York statute of 1890, ch. 398, § 12, then in force, imposed a penalty upon the owners of factories in which women were employed for failure to guard cogwheels. The court of appeals held that the absence of such guards was an obvious risk which the plaintiff assumed, as matter of law, and that she was not entitled to go to the jury upon any question of fact, as she had waived the benefit of the statute by continuing to work with knowledge of its violation by the defendant.

The common-law rule of New York upon the question of

[1] 148 N. Y. 372; 42 N. E. 986; 32 L. R. A. 367.

assuming the risk of a statutory defect seems to be derived from the peculiar doctrine that a violation of a statute, passed to protect personal safety, is not itself negligence, but is merely evidence of negligence to be submitted to the jury. If a violator of a statute can escape liability to a person injured thereby, by the verdict of a jury, upon the ground that he is merely "prima facie guilty of negligence,"[1] it is only a short step further to hold that an employee assumes the risk of injury, as matter of law, by continuing to work with knowledge of the employer's breach of the statute. Upon this point the New York Employers' Liability Act has required the courts to apply the like rule in favor of injured employees which they had previously applied to other classes of persons injured by reason of the defendant's breach of a specific statutory duty.

The prevailing doctrine is, however, contrary to the original New York doctrine. Doing the act prohibited by statute, or omitting to do the act commanded by the statute for the safety of a class of persons, to which the plaintiff belongs, renders the person guilty of negligence as matter of law, irrespective of his care or skill or diligence; and if the statutory breach is the proximate cause of the plaintiff's injury he is entitled to recover, and the doctrines of waiver, of assumption of risk, and of Volenti non fit injuria, do not apply.[2]

§ 231. Same—Constitutionality of this clause of the New York Employers' Liability Act of 1902.—There seems

[1] McRickard v. Flint, 114 N. Y. 222; 21 N. E. 153; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; Jones v. Belt, 8 Houst. (Del.) 562; 32 Atl. 723.

[2] 1 Thompson Neg. (2d ed.), § 10 and cases cited; Cayzer v. Taylor, 10 Gray (Mass.) 274; 69 Am. D. 317; Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; 16 N. E. 121; Ashman v. Flint &c. R. Co., 90 Mich. 567; 51 N. W. 645; Denver &c. R. Co. v. Robbins, 2 Colo. App. 313; 30 Pac. 261; Hayes v. Michigan Cent. R. Co., 111 U. S. 228; 4 S. Ct. 369; Tobey v. Burlington &c. R. Co., 94 Iowa 256; 62 N. W. 761; 33 L. R. A. 496.

to be no doubt that this clause of the New York Employers' Liability Act of 1902 is constitutional.

In the case of passengers and other classes of non-employees of the defendant, statutes modifying or abolishing the common-law defense of contributory negligence, and making the defendant an insurer of the plaintiff's personal safety, although no contract of insurance exists between the parties, have been held to be constitutional, and have been often enforced.[1]

§ 232. (2) Alabama rule—Early cases.—In Alabama the early cases went to one extreme in holding that knowledge and appreciation of the defect or danger was in no case an assumption of the risk, and that the maxim Volenti non fit injuria did not apply to actions under the Employers' Liability Act where the employer was aware of the defect and negligently failed to remedy it.[2] The only case in which the maxim was held to apply was when the employee himself created the defect, or consented to its creation by a third person.[3]

In Highland Ave. &c. R. Co. v. Walters, just cited, a yard-master and conductor was killed by being thrown from the foot-board of an engine on which he was standing, caused, as the plaintiff alleged, by a pile of coal which was left so near the track as to obstruct the passage of the engine. One count was for a defect in the condition of the ways of the railroad, and another was for the negligence of defendant's superintendent in allowing the coal to remain there. The coal belonged to one Peebles, who

[1] Chicago &c. R. Co. v. Zernecke, 183 U. S. 582; 22 S. Ct. 229; affirming 59 Neb. 689; 82 N. W. 26; Steamboat New World v. King, 16 How. (U. S.) 469; Copley v. New Haven &c. Co., 136 Mass. 6; Doyle v. Boston &c. R. Co., 145 Mass. 386; 14 N. E. 461; Commonwealth v. Boston &c. R. Co., 134 Mass. 211; Merrill v. Eastern R. Co., 139 Mass. 252; 29 N. E. 666.

[2] Mobile &c. R. Co. v. Holborn, 84 Ala. 133; 4 So. 146.

[3] Highland Ave. R. Co. v. Walters, 91 Ala. 435; 8 So. 357.

testified that it was deposited there by permission of the deceased. The chief defense was contributory negligence.

In delivering the court's opinion, Mr. Justice Clopton says, on pages 441, 442: "In railroading there are known perils incident to the service, no matter how well constructed the plant, works, and machinery may be, or how watchful and diligent the control and management of the trains. To these the statute has no application, and of these the employee takes the risk. When, however, an employee sustains injury in the cases and under the conditions specified in the statute, it operates to take from the employer the defense that the employee impliedly contracts to assume the known and ordinary risks incident to his employment. To this extent, and to this extent only, is the common-law rule abrogated. By the provisions of the statute, the employer is answerable in damages when the defect in the condition of the ways, works, machinery, or plant arose from, or had not been discovered or remedied owing to the negligence of the employer, or person to whom is entrusted the duty of seeing that they are in proper condition; and is exempted from liability when, not being aware of the defect or negligence, the employee has failed to give information thereof within a reasonable time after discovering it. Under this construction, contributory negligence can not be imputed to an employee from continuance in the service after merely discovering a defect or negligence, though it may increase the risk of injury. Something more is requisite—concurring failure to give information thereof within a reasonable time after knowledge of the defect or negligence, unless the employee knows that the employer or superior is already aware of it."

§ 233. Same—Late cases.—But these early cases have since been expressly overruled, and the Alabama court

has gone to the opposite extreme, and now holds that an employee who continues in the service with knowledge of a defect in the condition of the ways, works or machinery, though such defect exists in the ways, works or machinery of another department over which he has no control, assumes the risk of injury therefrom, after the lapse of a reasonable time for remedying the defect, and that the doctrine of Volenti non fit injuria applies to prevent a recovery by him, and was not changed by the Employers' Liability Act.[1]

In this case of Birmingham R. Co. v. Allen, just cited, a conductor in the employ of the defendant railroad was thrown from his train while on duty by the sudden turn or jerk of the train caused by its running on to a side-track from the main track because the switch had been left open. The defect in the switching-apparatus was the want of a lock or other sufficient means of fastening the switch. The plaintiff had known of this defect for a year prior to his injury. It was held that the want of a switch-lock was a "defect" within the meaning of the statute, but that the plaintiff, by continuing in the defendant's employ for more than a reasonable time with knowledge of the defect, had assumed the risk of injury incident to such defect; that the maxim Volenti non fit injuria applied, and that the plaintiff could not recover as matter of law. In this case the court claims to be following the English rule. Smith v. Baker[2] is not cited, however, and the decision seems to be contrary to that in Smith v. Baker.

The qualifying clause of the statute, providing in substance that an employee shall not recover under the act if he knew of the defect or negligence causing his injury and failed to give notice thereof, was held by the court

[1] Birmingham R. Co. v. Allen, 99 Ala. 359; 13 So. 8; 20 L. R. A. 457.
[2] (1891) A. C. 325.

not to prevent the application of the maxim to the facts of the case, and the reasoning of Bowen, L. J., in Thomas v. Quartermaine,[1] on this point, was said to be "convincing."[2] Referring to this provision, the court states on pages 374, 375, by Mr. Justice Coleman: "It would seem that the legislature, by a statutory enactment, recognized the application of the maxim of Volenti non fit injuria as declared by the court, and, out of abundant caution lest the statute might be construed to give a cause of action absolutely when the defect or negligence specified in the statute was the cause of injury, although the risk of such defect and negligence was voluntarily and knowingly assumed by the employee, added the proviso above referred to."

In the cases cited in the note,[3] the doctrine of Birmingham R. Co. v. Allen (Ala.)[4] was reaffirmed, and seems now to be the settled rule in Alabama. In the case of Louisville &c. R. Co. v. Banks, just cited, a freight-brakeman was knocked off the top of a car by a low bridge and killed. The maintenance of such a bridge was held to be prima facie negligence on the part of the railroad company, for which it would have been liable under the statute to one not familiar with the bridge; but inasmuch as the deceased had been warned about the bridge, and had passed under it about one hundred times in the course of his four months' employment, it was held that he had assumed the risk of injury, and that a verdict should have been ordered for the defendant. Mr. Justice Haralson says, on page 549, in delivering the court's opinion: "Another principle which may be considered as finally settled is that if an employee knows of the existence of dangers

[1] 18 Q. B. D. 685.

[2] Birmingham R. Co. v. Allen, supra, at p. 374.

[3] Louisville &c. R. Co. v. Banks, 104 Ala. 508; 16 So. 547; Louisville &c. R. Co. v. Stutts, 105 Ala. 368; 17 So. 29.

[4] 99 Ala. 359; 13 So. 8; 20 L. R. A. 457.

arising from defects in ways, works and machinery of the company, and continues in its service after the lapse of a reasonable time for the defects to be remedied or removed, he assumes this additional risk, though not incident to his original employment even."

This rule was somewhat modified in Alabama &c. R. Co. v. Davis (Ala.),[1] where a brakeman who had known for two years that a certain switch and side-track were in a defective condition was informed shortly before the accident by the section-foreman that the track had been fixed so as to be safe. The train upon which the plaintiff was employed ran into this side-track, was derailed by this defective condition of the track, and the plaintiff was injured. It was held that the foreman's statement that the track had been fixed was an intervening fact which justified the plaintiff in continuing in the service, and that he was entitled to go to the jury upon the issue of assumption of risk.

Knowledge of the defect or danger need not, however, be negatived in the complaint under the Employers' Liability Act. In Alabama, contrary to the rule in some other states, this is considered a matter of defense, which must be brought forward by plea. The burden is not upon the employee to show want of knowledge, but is upon the employer to show that the plaintiff had knowledge of the defect or negligence which caused his injury.[2]

An employee has the right to rely to some extent upon his superior's assurance of safety, as showing non-assumption of risk. Thus, in an action under the Alabama Employers' Liability Act, a foreman told the plaintiff it was not dangerous to send a truck down a heavy railroad-grade without a brake, closely after a hand-car upon

[1] 119 Ala. 572; 24 So. 862 (1898).

[2] Broslin v. Kansas City &c. R. Co., 114 Ala. 398; 21 So. 475 (1897). See also, post, § 268, and cases cited.

which the plaintiff rode. The plaintiff's foot was injured by this truck; and it was held that it was a question for the jury, and that it could not be ruled by the court that the risk was assumed.[1]

At common law the employee was deemed to assume the known and ordinary risks incident to his employment. For an injury caused by such dangers he could not recover damages from his employer.

The Alabama Employers' Liability Act abrogates this rule of the common law in part, but not to the extent of making the employer liable for an injury caused by a known danger against which human skill and caution can not provide. The statute gives the employee no remedy in the latter case; for there is no negligence of the employer, nor of any person for whose negligence the statute makes him liable. "The scope and operation of the statute is to make the employer answerable in damages for an injury caused by his own negligence, or the negligence of a coemployee of the same or superior grade, in the enumerated classes of cases."[2]

§ 234. (3) Massachusetts rule—Absence of guard-rail, or other safety-appliance.—In Massachusetts the court has been careful to decide each case on its particular facts, and has refrained from announcing any broad or general rules upon this difficult question. The effect of continuing to work with knowledge of the absence of certain safety-appliances has, however, been several times decided by this court.

The Massachusetts statute of 1895, chapter 362, relates to railroad corporations and certain defects and dangers in their rolling-stock. Upon this question of assuming the risk of injury by continuing to work with knowledge of

[1] Southern R. Co. v. Guyton, 122 Ala. 231; 25 So. 34.

[2] Mobile &c. R. Co. v. George, 94 Ala. 199, 218; 10 So. 145, per Clopton, J.

the risk, the statute declares in section 7: "Any employee of such corporation who may be injured by any locomotive, car, or train in use contrary to the provision of this act, shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such corporation after the unlawful use of such locomotive, car, or train has been brought to his knowledge."[1]

In general it may be stated that where the absence of the guard-rail, etc., is known to the employee, and its danger appreciated by him, it constitutes an obvious danger, and, if he is injured thereby, the employer is not liable under the act. By continuing to work on such defective ways, works, or machinery, without giving information thereof, the employee assumes the risk resulting from the absence of the guard or rail; the doctrine of Volenti non fit injuria applies, and a verdict should be ordered for the defendant.

In O'Maley v. South Boston Gas Light Co. (Mass.)[2] the defect in the defendant's coal-run consisted in not providing guards on the runs, by reason of which the plaintiff alleged that while wheeling coal in a barrow, he fell off the run and was injured. At various times during the previous fifteen years the plaintiff had done the same work, and the runs had been in the same condition. The court held that the plaintiff had assumed the risk, that the maxim Volenti non fit injuria applied, and that a verdict was properly ordered for the defendant.

In Toomey v. Donovan (Mass.)[3] the machine had no automatic guard to prevent the head-block from falling down in case the machine got out of order, by reason of

[1] See also, act of congress of March 2, 1893, 27 U. S. Stat. at Large 531; construed in Cleveland &c. R. Co. v. Baker, 91 Fed. 224; 33 C. C. A. 468; 66 U. S. App. 553 (1899).

[2] 158 Mass. 135; 32 N. E. 1119.

[3] 158 Mass. 232; 33 N. E. 396.

which the plaintiff was injured. At the trial the plaintiff offered to prove that for a long time prior to his injury such guards had been in use upon such machines, and that the defendants knew of them, and that the plaintiff did not. For a part of three years prior to the accident the plaintiff had worked upon a machine like the one upon which he was injured, and he knew that there was no guard. He was twenty-five years old, and, for aught that appeared, of ordinary intelligence. It was held, in an action under the statute, that the testimony offered was properly excluded, for the following reasons, as stated by Mr. Justice Morton, for the court, on page 237: "The fact that there was no guard was an obvious one; and, in working on the machine, he must be held to have assumed the risk resulting from the absence of a guard. Whether he did or did not know that automatic guards were in use on such machines was immaterial. He agreed to work on the machine as it was, and the defendants owed no duty to him to put on the guard. Having assumed the risk of operating the machine without a guard, the plaintiff can not now claim that one should have been put on."[1]

In Gleason v. New York &c. R. Co. (Mass.)[2] the plaintiff, a switchman, was injured by having his foot caught in a hole in the planking of the defendant's passenger-yard, where he had worked for six weeks. During that time he had been in the habit of throwing the switch at the hole where he was hurt. The hole was there when his employment began, and was perfectly open to view and obvious. In this action under the Employers' Liability Act the jury returned a verdict for the plaintiff; but the full court set it aside, on the ground that the plaintiff

[1] Citing Pingree v. Leyland, 135 Mass. 398, and Moulton v. Gage, 138 Mass. 390.

[2] 159 Mass. 68; 34 N. E. 79.

must be deemed to have assumed the risk of an obvious danger. Hannah v. Connecticut River R. Co. (Mass.)[1] was distinguished on the ground that a temporary hole in the road-bed was formed after the plaintiff's employment began, and had been there but a short time and had not been noticed by him. Under these facts it was held that the plaintiff had not assumed the risk as matter of law, and a verdict in his favor was allowed to stand.

§ 235. New York rule under Employers' Liability Act of 1902, chapter 600.—Whether continuing to work with knowledge of the defect or danger which causes the plaintiff's injury constitutes an assumption of risk or not is made a question of fact in all cases under the New York act of 1902. In no case can the court, in an action founded upon this statute, nonsuit the plaintiff or direct a verdict for the defendant, upon the ground that the plaintiff assumed the risk by continuing in the employ of the defendant with full appreciation of the danger; though, after a verdict has been rendered, the court may set aside the verdict if contrary to the evidence. The clause of the act which seems to require this construction has been quoted above.[2]

In these respects the act of 1902 makes a radical change in the law of New York. Prior to the passage of this act, the law of New York was settled by repeated decisions, recognizing the validity of the defense founded upon the doctrines of assumption of risk and Volenti non fit injuria. When the risk was obvious or apparent and was appreciated by the employee, the court exercised the power of directing a verdict for the defendant, or of nonsuiting the plaintiff, even when the plaintiff was a minor,[3] or the defendant had neglected some duty imposed upon him by

[1] 154 Mass. 529; 28 N. E. 682.

[2] Ante, § 230.

[3] Post, § 245, and cases cited.

statute for the protection of his employee's safety at work,[1] or the work which the plaintiff was called upon to perform was more dangerous than that which he was hired to perform.[2] If an employee continues to work on a machine for two or three days prior to his injury in a dark room before the lights are turned on, knowing that it is dangerous for him to do so, he assumes the risk as matter of law, and can not recover.[3]

§ 236. Indiana rules.—In Indiana the rule seems to be that if an employee continues in the service with knowledge of the defect or danger, and without any promise to repair the defect or remove the danger, he assumes the risk of injury resulting from open and obvious defects and dangers as matter of law, but that he does not assume such risks as are not understood and appreciated by him, nor such risks as arise from the breach of a specific statutory duty on the part of his employer. This principle applies to actions under the Employers' Liability Act as well as at common law.[4]

Unless the undisputed evidence shows that the danger was known to the employee and understood and appreciated by him, the question should be left to the jury for decision and should not be withdrawn from their consideration[5].

[1] Ante, §§ 229, 230, and cases cited.

[2] Maltbie v. Belden, 167 N. Y. 307, 312; 60 N. E. 645 (1901); citing with approval Leary v. Boston &c. R. Co., 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733.

[3] Ehalt v. Marshall, 14 N. Y. St. 552 (1888).

[4] Consolidated Stone Co. v. Summit, 152 Ind. 297, 302; 53 N. E. 235; Louisville &c. R. Co. v. Kemper, 147 Ind. 561, 565; 47 N. E. 214, and cases cited; Jenney Electric Light Co. v. Murphy, 115 Ind. 566, 569, 570; 18 N. E. 30; Cleveland &c. R. Co. v. Parker, 154 Ind. 153; 56 N. E. 86; Chicago &c. R. Co. v. Glover, 154 Ind. 584; 57 N. E. 244; Diezi v. G. H. Hammond Co., 156 Ind. 583; 60 N. E. 353 (1901); East Chicago Iron &c. Co. v. Williams, 17 Ind. App. 573; 47 N. E. 26; Monteith v. Kokomo &c. Co., 159 Ind. —; 64 N. E. 610 (1902).

[5] City of Fort Wayne v. Christie, 156 Ind. 172; 59 N. E. 385; Diezi v.

In an action under the Indiana Employers' Liability Act it was said by Mr. Justice Hadley for the court: "An employee assumes all the ordinary dangers of his employment, which are known to him, or which by the exercise of ordinary diligence would have been known to him. * * * In such cases constructive knowledge has the same force and effect as actual knowledge." It was accordingly held that a brakeman could not recover for a defect in the condition of the road-bed, if, by the exercise of ordinary diligence, he could have known of such defect.[1]

When a brakeman had his hand crushed while coupling cars by reason of a defect in the coupling-appliance, the court held that there was nothing in this clause of the Employers' Liability Act which either modified or restricted the rule concerning the assumption of risks as it existed prior to the passage of the act.[2] In this case Chief Justice Hadley observed, in speaking for the court (p. 518): "It is not negligence on the part of a railroad company to fail to warn an inexperienced employee of the greater danger incident to coupling cars that are supplied with deadwoods or buffers than cars having an ordinary device. Such increased danger is obvious and incident to the service.[3] Furthermore, if an employee fails to fully

G. H. Hammond Co., 156 Ind. 583; 60 N. E. 353; Hattaway v. Atlanta Steel &c. Co., 155 Ind. 507; 58 N. E. 718; Wabash R. Co. v. Ray, 152 Ind. 392, 400; 51 N. E. 920; O'Neal v. Chicago &c. R. Co., 132 Ind. 110; 31 N. E. 669; Rietman v. Stolte, 120 Ind. 314; 22 N. E. 304.

[1] Pennsylvania Co. v. Ebaugh, 152 Ind. 531, 534; 53 N. E. 763; citing Reitman v. Stolte, 120 Ind. 314; 22 N. E. 304; Indiana &c. R. Co. v. Dailey, 110 Ind. 75; 10 N. E. 631; Lamotte v. Boyce, 105 Mich. 545; 63 N. W. 517; Barnard v. Schrafft, 168 Mass. 211; 46 N. E. 621; Stubbs v. Atlanta &c. Mills, 92 Ga. 495; 17 S. E. 746. See also, Chicago &c. R. Co. v. Wagner, 17 Ind App. 22; 45 N. E. 76, 1121.

[2] Whitcomb v. Standard Oil Co., 153 Ind. 513, 518, 519; 55 N. E. 440.

[3] Citing Louisville &c. R. Co. v. Boland, 96 Ala. 626; 11 So. 667; 18 L. R. A. 260; East Tennessee &c. R. Co. v. Turvaville, 97 Ala. 122; 12 So. 63; Norfolk &c. R. Co. v. Cottrell, 83 Va. 512; 3 S. E. 123.

apprehend the extent of peril from a known defect, but voluntarily encounters it and attempts an act rendered hazardous by the defect, he assumes the risk."[1] The repeal of the second section of the original act by the act of March 7, 1895, was further held not to affect the doctrine of assumption of risk.[2]

Where, in obedience to specific orders from his superior officer, an employee undertakes to perform a different kind of work and more dangerous than that which he was employed to do, the fact that he knows it to be more dangerous than his usual work does not necessarily, as matter of law, render him guilty of contributory negligence, or constitute an assumption of the risk. It is a question for the jury upon all the circumstances of the case.[3]

In order to show that an injured employee has not assumed the risk of working with an incompetent coemployee, or a defect in the ways, works, or machinery, he must allege and prove that he had no knowledge, and that his employer had knowledge, actual or constructive, of such incompetency or defect causing his injury before the accident.[4]

[1] Citing Louisville &c. R. Co. v. Kemper, 147 Ind. 561; 47 N. E. 214; Umback v. Lake Shore &c. R. Co., 83 Ind. 191; Rietman v. Stolte, 120 Ind. 314; 22 N. E. 304; Ames v. Lake Shore &c. R. Co., 135 Ind. 363; 35 N. E. 117.

[2] Whitcomb v. Standard Oil Co., 153 Ind. 513, 515–518; 55 N. E. 440.

[3] Brazil Block Coal Co. v. Hoodlet, 129 Ind. 327; 27 N. E. 741; Clark Co. Cement Co. v. Wright, 16 Ind. App. 630; 45 N. E. 817; Consolidated Stone Co. v. Redmond, 23 Ind. App. 319; 55 N. E. 454.

[4] Peterson v. New Pittsburg Coal &c. Co., 149 Ind. 260; 49 N. E. 8; 63 Am. St. 289; Salem-Bedford Stone Co. v. Hobbs, 144 Ind. 146; 42 N. E. 1022; Evansville &c. R. Co. v. Tohill, 143 Ind. 49; 41 N. E. 709; 42 N. E. 352; Ohio &c. R. Co. v. Dunn, 138 Ind. 18; 36 N. E. 702; 37 N. E. 546; Ames v. Lake Shore &c. R. Co., 135 Ind. 363; 35 N. E. 117; Evansville &c. R. Co. v. Duel, 134 Ind. 156; 33 N. E. 355; Louisville &c. R. Co. v. Sandford, 117 Ind. 265; 19 N. E. 770; Creamery Package Mfg. Co. v. Hotsenpiller, 24 Ind. App. 122; 56 N. E. 250. Contra, Ohio &c. R. Co. v. Pearcy, 128 Ind. 197; 27 N. E. 479; Louisville &c. R. Co. v. Utz, 133 Ind. 265; 32 N. E. 881.

§ 237. Colorado cases.—In Maydole v. Denver &c. R. Co. (Colo.)[1] it was decided that the fact that a railway-brakeman continues in the defendant's service with knowledge that night inspection of the track has been discontinued, is a circumstance to be considered by the jury, but does not show, as matter of law, that the brakeman assumed the risk of injury arising from the burning of a railroad-bridge. By the discontinuance of night inspection, the brakeman was not exposed to any certain danger, and the connection between the acts of the parties is too remote.[2]

§ 238. Obvious danger.—At common law the rule is well settled that an employee assumes the obvious risks of his employment, and can not recover for an injury caused by an obvious danger which was known to and appreciated by him.[3] The same rule applies under the Employers' Liability Acts.[4]

In Fisk v. Fitchburg R. Co. (Mass.)[5] a freight-brakeman, while descending a side-ladder, was struck by a projecting awning at one of the defendant's stations and

[1] 15 Colo. App. 449; 62 Pac. 964 (1900).

[2] See also, Plank v. New York Cent. R. Co., 60 N. Y. 607 (1875); Snow v. Housatonic R. Co., 8 Allen (Mass.) 441 (1864).

[3] Goodes v. Boston &c. R. Co., 162 Mass. 287; 38 N. E. 500; Goldthwait v. Haverhill &c. R. Co., 160 Mass. 554; 36 N. E. 486; Connolly v. Eldredge, 160 Mass. 566; 36 N. E. 469; Kleinest v. Kunhardt, 160 Mass. 230; 35 N. E. 458; Wilson v. Tremont & Suffolk Mills, 159 Mass. 154; 34 N. E. 90; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155; 29 N. E. 464; 31 L. R. A. 537; Mahoney v. Dore, 155 Mass. 513; 30 N. E. 366; Vincennes Water Co. v. White, 124 Ind. 376; 24 N. E. 747; Naylor v. Chicago &c. R. Co., 53 Wis. 661; 11 N. E. 24; Olson v. McMullen, 34 Minn. 94; 24 N. E. 318.

[4] Gleason v. New York &c. R. Co., 159 Mass. 68; 34 N. E. 79; O'Maley v. South Boston Gas Light Co., 158 Mass. 135; 32 N. E. 1119; Connelly v. Hamilton Woollen Co., 163 Mass. 156; 39 N. E. 787; Cassady v. Boston &c. R. Co. 164 Mass. 168; 41 N. E. 129; Allard v. Hildreth, 173 Mass. 26; 52 N. E. 1061.

[5] 158 Mass. 238; 33 N. E. 510.

injured. He had been employed by the road about two years, and was acquainted with that station and knew there was an awning there. The awning was of the ordinary kind, and had not been changed for the worse during the plaintiff's term of employment. It was held that the employer was not liable at common law, because the risk was one which the plaintiff must be deemed to have assumed; and that the employer was not liable under the statute because "the duty of altering the awnings upon its stations was not cast upon the defendant by the enactment of the statute."[1]

In Lehman v. Van Nostrand (Mass.)[2] the plaintiff, who was an experienced packer of bottles, was injured by the explosion of a bottle of ale while he was packing it. About an hour before his injury two other bottles had exploded, and the plaintiff knew that the explosion was due to the fact that the ale was in a lively condition and that there was danger in handling the bottles. In an action under the Employers' Liability Act of Massachusetts it was held that the plaintiff had assumed the risk of injury arising from this cause, and that a verdict for the plaintiff could not be sustained. So in O'Brien v. Staples Coal Co. (Mass.)[3] it was held that the trial court was warranted in ordering a verdict for the defendant on the ground that the plaintiff had assumed the risk of an obvious danger where he was caught by a rope and hoisted into the air.

In Kenney v. Hingham Cordage Co. (Mass.)[4] Mr. Justice Morton, in delivering the opinion of the court, says upon the question of assumption of risk of an obvious danger: "And the question in each case is not whether the employee has actually observed, and by a conscious act of the

[1] Per Allen, J., for the court, at page 239.
[2] 165 Mass. 233; 42 N. E. 1125.
[3] 165 Mass. 435; 43 N. E. 181.
[4] 168 Mass. 278, 282; 47 N. E. 117 (1897).

will assumed all of the risks involved, but whether the risks are incident to and naturally grow out of the employment in which he is engaged, and are such as, taking his age, intelligence and experience into account, he must be held to have appreciated if he saw, and such as, if he did not see, he could have seen and understood if he had looked. If the risks are of this character, then they are said to be obvious and the employee assumes them."

The want of a railing around a vat containing vitriol in the employer's mill where the plaintiff works is an obvious danger, which he assumes, as matter of law, by continuing to work with knowledge thereof without objection, although the vat was put in after the plaintiff entered the defendant's service, and his work was taking rolls of wire from the reels and loading them on a car.[1]

In Denver Tramway Co. v. Nesbit (Colo.)[2] it was ruled that a street-car conductor assumes the risk arising from the absence of a fender or life-guard between a motor-car and a trail-car, and if he falls between the two cars and is injured he can not recover, as matter of law, because the risk is open and obvious.[3]

In Louisville &c. R. Co. v. Stutts (Ala.)[4] a locomotive-engineer, while engaged in shifting cars from a track to a trestle, lost control of his engine, which ran with great speed and force against the stop-block at the end of the trestle, threw him a distance of twenty or thirty feet to the ground, and caused his death. The defects complained of were that the trestle was too high and too short for safety in shifting cars. It was twenty or thirty feet high

[1] Carrigan v. Washburn & Moen Mfg. Co., 170 Mass. 79; 48 N. E. 1079.

[2] 22 Colo. 408; 45 Pac. 405 (1896).

[3] See also, Ladd v. Brockton St. R. Co., 180 Mass. 454; 62 N. E. 730 (1902); Rogers v. Galveston City R. Co., 76 Tex. 502; 13 S. W. 540; Jenney Electric Light Co. v. Murphy, 115 Ind. 566; 18 N. E. 30 (1888); Brewer v. Flint &c. R. Co., 56 Mich. 620; 23 N. W. 440.

[4] 105 Ala. 368; 17 So. 29; 53 Am. St. 127.

at the end, and about one hundred and twenty feet long. The uncontradicted evidence showed that one hundred and twenty feet, though somewhat short, was sufficient space within which to handle an engine if done with care, and that the deceased had done it for two weeks without accident at this same place. It was held in an action under the Employers' Liability Act that the dangers were open and obvious to any one of fair intelligence, that the deceased assumed the risk of injury therefrom, and that a verdict should have been ordered for the defendant.

"This rule is especially applicable when the danger does not arise from the defective condition of the permanent ways, works or machinery of the master, but from the manner in which these are used, and when the existence of the danger could not well be anticipated, but must be ascertained by observation at the time."[1]

In Sullivan v. Fitchburg R. Co. (Mass.)[2] a trackman was killed by a "wild" engine, so-called; that is, one which runs outside of any schedule time. The deceased and several others were engaged in pushing a small platform-car, upon which they had their tools for repairing the track. The wild engine came around a curve suddenly, and before the deceased could get out of the way he was struck and killed. In an action under the Employers' Liability Act, it appearing that it was a part of the duty of the trackmen to look out for "wild" engines, a majority of the court held that the trackmen assumed the risk of such danger, and that the railroad company was not liable.

§ 239. Employee's fear of losing his place.—In an action under the Employers' Liability Act for a defect in the permanent part of the ways, works, or machinery, the

[1] Lothrop v. Fitchburg R. Co., 150 Mass. 423, 425; 23 N. E. 227, per Field, J.

[2] 161 Mass. 125; 36 N. E. 751.

circumstance that the plaintiff's motive for continuing to work in a dangerous place is the fear or dread of losing his situation and of being without work, or means of support, is not sufficient to prevent an assumption of an obvious danger.

In Lamson v. American Axe &c. Co. (Mass.)[1] the plaintiff was injured by the fall of a hatchet from a rack. The plaintiff's work was to paint the hatchets and place them on this rack to dry. He complained to the defendant's superintendent that the rack was unsafe and that, by reason of the jarring of near-by machinery, the hatchets were likely to fall off upon him while at work. The superintendent told him to use the rack or leave. It was held that a verdict was rightly directed for the defendant, notwithstanding the fact that one of the plaintiff's motives was the fear of losing his place.

A like rule prevails in actions at common law for injuries to employees, where there has been no promise by the employer to repair or alter the dangerous or defective condition of the ways, works, machinery or plant.[2]

§ 240. Same—Ignorance of plaintiff, and failure to warn him of increased danger.—When the danger is not hidden or in the nature of a trap, but is in plain sight of the employee while in the ordinary discharge of his duties, the fact that he did not see the defect or danger, or know of its existence before his injury, is not sufficient to entitle him to go to the jury.[3] Nor does the fact that

[1] 177 Mass. 144; 58 N. E. 585.

[2] Leary v. Boston &c. R. Co., 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733; Haly v. Case, 142 Mass. 316, 322; 7 N. E. 877; Wescott v. New York &c. R. Co., 153 Mass. 460; 27 N. E. 10; Woodley v. Metropolitan R. Co., L. J. 46 Ex. (N. S.) 521. Regarding the effect of a promise to repair a defect, see ante, § 218, and cases cited; also Silvia v. Wampanoag Mills, 177 Mass. 194; 58 N. E. 590; Patterson v. Pittsburg &c. R. Co., 76 Pa. St. 389.

[3] Thain v. Old Colony R. Co., 161 Mass. 353; 37 N. E. 309; Austin v.

the plaintiff was ignorant of the precise extent of the danger,[1] or of the character of the injury he might sustain,[2] prevent the presiding justice from directing a verdict for the defendant, on the ground that the plaintiff had assumed the risk.

In East Tennessee &c. R. Co. v. Turvaville (Ala.)[3] a brakeman, while coupling cars with double buffers, was crushed between them. He had had some experience in coupling cars with single buffers, but none in coupling cars with double buffers, which it appeared were more dangerous to couple; nor did he know before his injury that these cars had double buffers. His injury was received during the first night of his employment. He had received no instruction that double buffers were more hazardous than single ones. In an action under the Employers' Liability Act it was held that the danger was an obvious one, open to the ordinary observation of any one using reasonable care and prudence, and that the failure of the defendant or its yardmaster to warn the plaintiff of the increased danger did not render the defendant liable.[4]

So, if a man employed in the car-house of a street-railroad company is caught and injured between two long open cars swinging towards each other on a curve at the entrance to the car-house, the fact that the risk was in-

Boston &c. R. Co., 164 Mass. 282; 41 N. E. 288; Lovejoy v. Boston &c. R. Co., 125 Mass. 79; 28 Am. R. 206; Goldthwait v. Haverhill &c. R. Co., 160 Mass. 554; 36 N. E. 486; Griffin v. Ohio &c. R. Co., 124 Ind. 326; 24 N. E. 888; Hathaway v. Michigan Cent. R. Co., 51 Mich. 253; 16 N. W. 634; 47 Am. R. 569; Pederson v. Rushford, 41 Minn. 289; 42 N. W. 1063.

[1] Connelly v. Hamilton Woollen Co., 163 Mass. 156; 39 N. E. 787; Flynn v. Campbell, 160 Mass. 128; 35 N. E. 453.

[2] Feely v. Pearson Cordage Co., 161 Mass. 426; 37 N. E. 368.

[3] 97 Ala. 122; 12 So. 63.

[4] See also, Louisville &c. R. Co. v. Banks, 104 Ala. 508; 16 So. 547; Hathaway v. Michigan Cent. R. Co., 51 Mich. 253; 16 N. W. 634; 47 Am. R. 569.

creased after his employment commenced, and only one month before his injury, by the use of long open cars in the place of short closed cars, will not entitle him to go to the jury, and a verdict should be ordered for the defendant, upon the ground that the plaintiff had assumed the risk of an obvious danger if he continued to work without protest or promise of change.[1]

When, however, the defect or danger is concealed,[2] or has existed for a very short time without the employee's knowledge,[3] the plaintiff may be entitled to go to the jury. So, also, when the injured employee is young or inexperienced, and the defendant has omitted to give him proper instructions and warning of an increased danger, the plaintiff may be entitled to go to the jury, even if the increased danger was caused by a fellow servant.[4] Nor does an employee, even if he is an experienced man, assume the risk of injury caused by a reckless method of doing business adopted by his employer,[5] nor the risk due to a negligent attempt to improve a machine.[6]

In Flutter v. New York &c. R. Co. (Ind.)[7] it was decided that where a brakeman while running alongside of a moving locomotive-engine is thrown and injured by unboxed wires near the ground across his path, he may recover from his employer at common law for failure to furnish a reasonably safe place in which to work.

[1] Goldthwait v. Haverhill &c. R. Co., 160 Mass. 554; 36 N. E. 486.

[2] Snow v. Housatonic R. Co., 8 Allen (Mass.) 441; 85 Am. D. 720; Ferren v. Old Colony R. Co., 143 Mass. 197; 9 N. E. 608; Plank v. New York Cent. &c. R. Co., 60 N. Y. 607.

[3] Gustafsen v. Washburn & Moen Mfg. Co., 153 Mass. 468; 27 N. E. 179; Hannah v. Connecticut River R. Co., 154 Mass. 529; 28 N. E. 682.

[4] Bjbjian v. Woonsocket Rubber Co., 164 Mass. 214; 41 N. E. 265.

[5] Caron v. Boston &c. R. Co., 164 Mass. 523; 42 N. E. 112.

[6] Slattery v. Walker & Pratt Mfg., 179 Mass. 307; 60 N. E. 782.

[7] 27 Ind. App. 511; 59 N. E. 337 (1901).

§ 241. Risks arising after the plaintiff entered the service may also be assumed.—Both at common law and under the Employers' Liability Act the circumstance that the defective condition of the defendant's ways, works or machinery arises after the plaintiff enters the employ of the defendant does not prevent the plaintiff from being precluded from recovery on the doctrine of assumption of risk or Volenti non fit injuria.

In Ford v. Mt. Tom Sulphite Pulp Co. (Mass.)[1] the plaintiff was caught by a projecting set-screw put in since the beginning of his employment and was seriously injured. At the time of the accident the plaintiff was on a platform three feet lower than the shaft with the set-screw, and was trying to throw a belt off a pulley at the end of the shaft on the other side of the bearing and one foot distant from the set-screw. The plaintiff had charge of the machinery in this room. At the place where he was working there was not much light. In an action under the statute, with a count at common law, it was held that a verdict was properly directed for the defendant, on the ground that the danger of a revolving shaft is an obvious danger, and the mere fact that the risk was enhanced subsequent to the plaintiff's employment did not entitle the plaintiff to go the jury on this question. It was said by Mr. Justice Holmes for the court that a set-screw was a common device, and that the employer was under no legal obligation to warn an adult workman of the presence and danger of a set-screw.[2]

In Carrigan v. Washburn & Moen Mfg. Co. (Mass.)[3]

[1] 172 Mass. 544; 52 N. E. 1065.

[2] Citing Donahue v. Washburn & Moen Mfg. Co., 169 Mass. 574; 48 N. E. 842; Goodnow v. Walpole Emery Mills, 146 Mass. 261; 15 N. E. 576; Hale v. Cheney, 159 Mass. 268; 34 N. E. 255; Rooney v. Sewall Cordage Co., 161 Mass. 153; 36 N. E. 789; Carey v. Boston &c. R. Co., 158 Mass. 228; 33 N. E. 512.

[3] 170 Mass. 79; 48 N. E. 1079.

the plaintiff fell into a vitriol-vat and was severely scalded. Six or eight weeks before the accident two vats had been placed next to each other in the floor of that part of the shop where the plaintiff worked, one vat containing vitriol and the other water. There was no railing or other protection or means of warning provided against falling or walking into the vats when the covers were off and the vats were in use. The accident happened in the evening when the covers were off; and the vats had never been opened in the evening before. The plaintiff's work was the taking of rolls of wire from the reels and loading them on to a car, and at the time of the accident he was attempting to recover a bundle of wire which had fallen into the elevator-well, and for which he was held responsible. The steam rising from the vats as the hot wire was dipped into them obscured the light and rendered their outlines indistinct. The plaintiff had the vats in mind and was moving cautiously at the time. It was held that the want of a railing around the vats was an obvious danger which the plaintiff knew and understood, and that the obscurity, whether it arose from want of light or from the steam, or both, was also a danger which the plaintiff assumed, as the vats themselves could not be used without having the covers removed.[1] It was further held that the fact that the vats were put in long after the plaintiff entered the defendant's employment was, under the circumstances, immaterial, because he knew that they were there and that there was no railing, and that when the covers were off there was danger of falling into them, and continued to work without any objection on account of the additional risk to which he was subjected by them.

[1] Citing Moulton v. Gage, 138 Mass. 390; Young v. Miller, 167 Mass. 224; 45 N. E. 628; Willets v. Watt, (1892) 2 Q. B. 92; Anthony v. Leeret, 105 N. Y. 591, 600; 12 N. E. 561.

In an action at common law Mr. Justice Knowlton, in delivering the opinion of the court, said: "In this commonwealth, as well as elsewhere, plaintiffs have been precluded from recovery alike where their assumption of risk grew out of an implied contract with reference to the condition of things at the time of entering the defendant's service and where they voluntarily assumed a risk which came into existence afterwards."[1]

Upon the general question of risks arising subsequently to employment, see cases cited in the note.[2]

§ 242. Same—Work outside of ordinary duty.—If an employee be ordered to do new work which he was not hired to perform, and is injured while doing this new work, this is a circumstance in his favor upon the question of assumption of risk, but it does not always entitle him to go to the jury.

In O'Connor v. Adams (Mass.)[3] the plaintiff, a raw Irish lad of twenty years, was hired to shovel sugar in the warehouse of the defendant's sugar-refinery, in which there was no machinery. Shortly afterward he was ordered to clean some machines as another man was doing. The machines were in motion, and while he was trying to clean one of the machines his arm was caught and torn off. It was obvious that the inner cylinder revolved with great rapidity and that the machines were started and

[1] Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 161; 29 N. E. 464; 31 Am. St. 537; citing Huddleston v. Lowell Machine Shop, 106 Mass. 282; Pingree v. Leyland, 135 Mass. 398; Taylor v. Carew Mfg. Co., 140 Mass. 150; 3 N. E. 21; Gilbert v. Guild, 144 Mass. 601; 12 N. E. 368; Murphy v. Greeley, 146 Mass. 196; 15 N. E. 654; Wood v. Locke, 147 Mass. 604; 18 N. E. 578; Miner v. Connecticut River R. Co., 153 Mass. 398; 26 N. E. 994.

[2] McIntire v. White, 171 Mass. 170; 50 N. E. 524; Goldthwait v. Haverhill &c. R. Co., 160 Mass. 554; 36 N. E. 486; Keats v. National Heeling Machine Co., 65 Fed. 940; 13 C. C. A. 221; Peirce v. Bain, 80 Fed. 988; 27 C. C. A. 361.

[3] 120 Mass. 427.

stopped by moving a lever one way or the other, and the cleaning could have been done without putting his hand into the place of danger. It was held that the evidence warranted a finding that the plaintiff was put to work in a place of peculiar danger without warning; that it could not be ruled as matter of law that he had assumed the risk of an obvious danger, and that he was entitled to go to the jury.

So, when a young and inexperienced employee is ordered by his superior to do hazardous work outside the contract of service, he does not assume the risk as matter of law, and if injured while attempting to perform the work, the employer is liable at common law, if the order be a negligent one to give under all the circumstances of the case.[1]

On the other hand, where a man was hired as a freight-truckman, and after doing this work for about three years, was ordered to perform the duties of a locomotive-fireman, from one to three hours a day, in addition to his regular work, and was jolted off the locomotive after twenty days' service and injured, it was held that he assumed the risk as matter of law, and could not recover from his employer in an action at common law.[2]

An inexperienced workman has a right to rely to some extent upon his superintendent's greater knowledge and experience, and to act upon the assumption that the superintendent would not expose him to unnecessary peril. If injured while obeying the superintendent's order to do a dangerous thing, the jury may find negligence on the part of the superintendent and non-assumption of the risk on the part of the injured employee, and hold the common employer liable under the act.[3]

[1] Railroad Co. v. Fort, 17 Wall. 553. See also, Lalor v. Chicago &c. R. Co., 52 Ill. 401; 4 Am. R. 616; Chicago &c. R. Co. v. Bayfield, 37 Mich. 205; Jones v. Lake Shore &c. R. Co., 49 Mich. 573; 14 N. W. 551.

[2] Leary v. Boston &c. R. Co., 139 Mass. 580; 2 N. E. 115; 52 Am. R. 733.

[3] Southern R. Co. v. Shields, 121 Ala. 460; 25 So. 811 (1899).

Even if it be found as a fact by the jury that the plaintiff was in the exercise of due care and diligence at the time of the injury, or that he was not negligent, this does not prevent the court from holding, on the facts, that the danger was an obvious one which the plaintiff voluntarily assumed. In Mellor v. Merchants' Mfg. Co. (Mass.)[1] a loom-fixer was injured by a belt slipping off a pulley while he was attempting to repair a defect. This work was outside his ordinary duty, and was undertaken at the suggestion of a fellow workman, and with the mere consent of his immediate superior. The jury found a general verdict for the plaintiff, which included a finding that he was in the exercise of due care and diligence. The court assumed for the purposes of that case that this finding was conclusive upon the court, but held, nevertheless, that the plaintiff could not recover, for the reason that the plaintiff voluntarily took the risk of an obvious danger. Mr. Justice Holmes, in delivering the opinion, says: "The statute does not put servants in a better position than that of the most favored persons who are not servants" (page 364), and quotes with approval an illustration put by Bowen, L. J., in Thomas v. Quartermaine,[2] in these words: "I employ a builder to mend the broken slates upon my roof and he tumbles off. Have I been guilty of any negligence or breach of duty towards him? Was I bound to erect a parapet round my roof before I had its slates mended?"

A like rule prevails at common law.[3]

§ 243. Understanding and appreciation of danger.—In order to constitute such an assumption of risk as will prevent a recovery for negligence, it must appear that the employee understood and appreciated the danger to which

[1] 150 Mass. 362; 23 N. E. 100; 5 L. R. A. 792.
[2] 18 Q. B. D. 685, 695.
[3] Stuart v. West End St. R. Co., 163 Mass. 391; 40 N. E. 180.

he was exposed. If this does not appear, this ground is no defense for the employer, either at common law[1] or under the Employers' Liability Acts.[2]

In Prendible v. Connecticut River Mfg. Co. (Mass.)[3] the plaintiff was injured by the fall of a staging, caused either by its defective condition or its overloading by order of the defendant's superintendent. The plaintiff had been in America about ten years, and had worked about a year and a half in a mill-yard and seven years in a dye-house before he was employed by the defendant. He had never had anything to do with the building of stagings. At the time of his injury he was ordered to get upon the staging to pile up wood, and as soon as he stepped upon it it fell. In an action under the act, it was held that "it did not appear that the plaintiff understood and appreciated the danger of injury from working on the staging so far that he can be said to have assumed the risk." (Per Knowlton, J., page 139.)

In Lynch v. Allyn (Mass.)[4] an inexperienced workman was injured by the falling of a bank of earth upon him while he was engaged in undermining it by picking at the bottom. The bank was composed of hard-pan and clay and some sand, and was from eight to ten feet high and fifteen or twenty feet long. The bank was not expected to fall by the force of gravitation, but was to be pried over from the top by bars after a proper depth had been picked out at the bottom. In an action under the

[1] Bjbjian v. Woonsocket Rubber Co., 164 Mass. 214; 41 N. E. 265; Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155; 29 N. E. 464; 31 Am. St. 537; Mahoney v. Dore, 155 Mass. 513; 30 N. E. 366; Patnode v. Warren Cotton Mills, 157 Mass. 283; 32 N. E. 161; 34 Am. St. 275.

[2] Prendible v. Connecticut River Mfg. Co., 160 Mass. 131; 35 N. E. 675; Coan v. City of Marlborough, 164 Mass. 206; 41 N. E. 238; Powers v. City of Fall River, 168 Mass. 60; 46 N. E. 408 (1897).

[3] 160 Mass. 131; 35 N. E. 675.

[4] 160 Mass. 248; 35 N. E. 550.

Employers' Liability Act the defendant claimed that the danger was obvious, and that the presiding judge should have so ruled. The full court held, however, that the question was one for the jury. Mr. Justice Lathrop, in delivering the opinion of the court, says on pages 253, 254: "While we have no doubt of the power and of the duty of the court in a case either at common law or under the statute of 1887, ch. 270, where the peril is obvious, so to rule, as matter of law, yet we are of opinion in this case that, on the evidence, the question was for the jury. The case was not one where a man was set to work to undermine a bank which was expected to fall by the law of gravitation, and where he was expected to look out for himself. In such a case we should have no doubt that the danger would be obvious.[1] In the case at bar it appears from the testimony of the defendant's superintendent that the way this bank was to be taken down was by picking at the bottom until a proper depth was reached, and then to pry the top over with bars; that he knew there was sand in the bank, and that such a bank is more liable to fall than a clay-bank; that he meant to guard against it, and that when he left he intended to come back very soon. * * * On the evidence, we do not think that the danger of the bank falling was so obvious that the judge ought to have given the ruling requested."

In Coan v. City of Marlborough (Mass.)[2] a common laborer, while digging a trench, was injured by the sides caving in, due to a failure to brace them properly and to blasting rock in the bottom of the trench. The plaintiff had worked much in such trenches and knew that the trench was not close-sheathed; that portions of its sides were not covered; that blasting was done to remove rock

[1] Citing Griffin v. Ohio &c. R. Co., 124 Ind. 326; 24 N. E. 888, and Swanson v. City of Lafayette, 134 Ind. 625; 33 N. E. 1033.

[2] 164 Mass. 206; 41 N. E. 238.

theory supported by the evidence is that it was caused by the plaintiff's negligence or by an obvious risk of the business, which he assumed when he entered the defendant's service."[1]

In Mary Lee Coal &c. Co. v. Chambliss (Ala.)[2] a locomotive-fireman, aged seventeen years, with no experience in throwing switches, was injured while throwing a switch in obedience to the orders of his engineer, the regular switchman being absent from duty. In an action under the Alabama act, the court, by Mr. Justice Coleman, says, on page 178: "An employee by his agreement assumes the ordinary risks incident to and within the scope of his employment. He may be presumed to know these when he enters into his contract. This general rule will not apply when the employee is young and inexperienced, and these facts are known at the time to the employer."[3]

§ 245. Assumption of risk by minor employee.—Beach on Contributory Negligence (2d ed., § 357) contains a vigorous argument in favor of the view that a minor employee should not be deemed to have assumed the risks of the employment, because the doctrine is founded upon an implied contract, and that minors are not bound even by express contracts with their employers, much less by implied contracts. The adjudications, however, are strongly to the contrary, especially in Massachusetts, New York and Alabama.[4] The Alabama court places its decision

[1] Citing Ciriack v. Merchants' Woolen Co., 151 Mass. 152; 23 N. E. 829; 6 L. R. A. 733; Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 160; 36 N. E. 789; Cheney v. Middlesex Co., 161 Mass. 296; 37 N. E. 175; Stuart v. West End St. R. Co., 163 Mass. 391; 40 N. E. 180; O'Connor v. Whittall, 169 Mass. 563; 48 N. E. 844.

[2] 97 Ala. 171; 11 So. 897.

[3] Citing Williams v. South &c. R. Co., 91 Ala. 635, 640; 9 So. 77. See also, Worthington v. Goforth, 124 Ala. 656; 26 So. 531 (1900).

[4] King v. Boston &c. R. Co., 9 Cush. (Mass.) 112; Curran v. Merchants' Mfg. Co., 130 Mass. 374; 39 Am. R. 457; Siddall v. Pacific

upon the ground that such a contract is not void but merely voidable, and that the bringing of an action for an injury, caused by some specific negligence committed in the course of the business, amounts to an adoption or ratification of the voidable contract, and subjects the minor to the same rules which govern in actions by adult employees. The same case, however, contains a dictum by Mr. Justice Head, which indicates that the doctrine has been somewhat modified by the Employers' Liability Act. Thus he says: "In cases under our statute known as the Employers' Liability Act, which renders actionable against the employer the negligence of fellow servants in certain specified cases, the age of the injured party might be material in evidence to give character to the act of the servant charged as negligent, or exert an influence upon the question of contributory negligence when that defense is interposed."[1]

That the doctrine that an employee assumes the risks of his employment is based upon an implied contract between employer and employee, both at common law[2] and under the Employers' Liability Act,[3] has been held in some jurisdictions; but the better view seems to be that the doctrine is founded upon considerations of public policy not dependent upon contract, and that a minor

Mills, 162 Mass. 378; 38 N. E. 969; Harris v. McNamara, 97 Ala. 181, 182, 183; 12 So. 103; Fisk v. Central Pac. R. Co., 72 Cal. 38; 13 Pac. 144; 1 Am. St. 22; Brown v. Maxwell, 6 Hill (N. Y.) 592; 44 Am. D. 771; Gartland v. Toledo &c. R. Co., 67 Ill. 498; Hickey v. Taaffe, 105 N. Y. 26; 12 N. E. 286 (1887); Buckley v. Gutta Percha Co., 113 N. Y. 540; 21 N. E. 717; Malsky v. Schumacher, 56 N. Y. St. 840; 27 N. Y. Supp. 331; Lovell v. De Bardelaben Coal &c. Co., 90 Ala. 13; 7 So. 756; Cudahy Packing Co. v. Marcan, 106 Fed. 645; Corning Steel Co. v. Pohlplotz, 29 Ind. App. —; 64 N. E. 476 (1902).

[1] Harris v. McNamara, 97 Ala. 181, 183; 12 So. 103.

[2] Priestley v. Fowler, 3 M. & W. 1; Wilson v. Merry, L. R. 1 H. L. Sc. 326; Griffin v. Ohio &c. R. Co., 124 Ind. 326, 327; 24 N. E. 888, and cases cited; Siddall v. Pacific Mills, 162 Mass. 378, 382; 38 N. E. 969.

[3] Griffiths v. Dudley, 9 Q. B. D. 357.

employee, if of sufficient understanding to appreciate the risk incurred, is bound by the rule.[1] This view is also supported by the decisions holding that a workman may assume the risks of his employment, so as to prevent a recovery from the owner or lessee of premises for injuries caused by an obvious danger therein, when there is no contractual relation between the two persons.[2] It likewise receives some support from the cases which decide that an employee who is injured while engaged upon work outside of his regular duties may be deemed to have assumed the risk of injury, irrespective of any implied term in his contract of service, and can not recover of his employer either under the Employers' Liability Act, or at common law.[3]

B. Negligence of a Superintendent.

§ 246. No assumption of risk from superintendent's negligence under the statute.—An employee does not assume the risk arising from the negligence of a person entrusted by the employer with and exercising superintendence. To apply the doctrine of assumption of risk to such a case would defeat the purpose of the statute. If the injury be caused by the negligence of a superintendent, the employer is liable under the act.

Thus, in Davis v. New York &c. R. Co. (Mass.),[4] the plaintiff was run down by a train while he was repairing a track for the defendant. The work required him to bend over, facing the north, so that he had to rely upon the

[1] De Graff v. New York &c. R. Co., 76 N. Y. 125; Railroad Co. v. Fort, 17 Wall. 553, 557.

[2] Wood v. Locke, 147 Mass. 604; 18 N. E. 578; Goddard v. McIntosh, 161 Mass. 253; 37 N. E. 169.

[3] Mellor v. Merchants' Mfg. Co., 150 Mass. 362; 23 N. E. 100; 5 L. R. A. 792; Stuart v. West End St. R. Co., 163 Mass. 391; 40 N. E. 180.

[4] 159 Mass. 532; 34 N. E. 1070.

warning of the section-boss of the approach of trains from the south. At the trial the evidence was conflicting as to whether the section-boss gave the usual warning, but the jury found a verdict for the plaintiff. At the argument before the full court the defendant contended that the plaintiff must be considered to have assumed the risk of the section-boss's failure to warn him of approaching trains. But the court held otherwise, and in the course of an opinion by Holmes, J., said: "A workman does not take the risk that a person entrusted by his employer with and exercising superintendence will be negligent in the exercise of that duty. If he were held to do so, the statute would be made of no avail."[1] (Page 536.)

In Malcolm v. Fuller (Mass.)[2] a workman was injured by an explosion while in the act of drilling out a blast in a stone-quarry under the direction of the defendant's superintendent. The injury was caused by reason of the superintendent's negligence, and the defendant contended that such negligence was one of the risks which the plaintiff assumed when he entered upon the service, and that therefore he could not recover. This was true at common law in Massachusetts.[3] But the court held that the Employers' Liability Act changed the common-law rule upon this point, and made the defendant responsible for such negligence. If the negligence of the defendant's superintendent can fairly be found to be the cause of the plaintiff's injury, a verdict for the plaintiff is proper, notwithstanding the fact that the injury was attended by certain obvious risks which he must be deemed to have assumed. Thus, in McPhee v. Scully (Mass.),[4] the plaintiff, while in

[1] See also, Smith v. Baker, (1891) A. C. 325; Lynch v. Allyn, 160 Mass. 248; 35 N. E. 550; Hennessy v. City of Boston, 161 Mass. 502; 37 N. E. 668.

[2] 152 Mass. 160; 25 N. E. 83.

[3] Kenney v. Shaw, 133 Mass. 501.

[4] 163 Mass. 216; 39 N. E. 1007.

the defendant's employ, had his hand crushed in a pile-driver. When the accident happened the plaintiff was standing aloft on a joist, swinging and steadying a pile to put it in position. The driving-hammer was five feet above him, held in place by a chocking-block. In the course of his work he put his left hand on top of the pile, directly in the line of descent of the hammer, and at this instant the hammer fell and caused the injury. There was no defect in the pile-driver, and the cause of the hammer's fall was the accidental pulling away of the chocking-block by the strain of the gypsy-fall, which a drunken fellow workman who held the fall negligently allowed to get over the block in such a way that when made taut it pulled the block out from under the hammer. The block projected about three inches beyond the outer face of the upright beam, and it was obvious that the gypsy-fall might get over the projecting end of the block and cause the hammer to fall. The defendant's foreman or superintendent in charge of the work gave the order to "hoist again" after the fall had become foul of the block and immediately before the accident, and the intoxication of the workman who held the fall was evident. In this action under the Employers' Liability Act it was held that the plaintiff had not assumed the risk of injury from the superintendent's negligence in giving the order to "hoist again" at that time, and in allowing the fall to be handled by a drunken workman, and that a verdict for the plaintiff was justified by the evidence.[1]

Under the Massachusetts Employers' Liability Act it can not be ruled as matter of law that an inexperienced workman who is engaged in undermining a bank of earth assumes the risk attendant upon the temporary absence of the superintendent, whose duty it is to warn him of

[1] See also, Allard v. Hildreth, 173 Mass. 26; 52 N. E. 1061; O'Brien v. West End St. R. Co., 173 Mass. 105; 53 N. E. 149.

danger. If he is injured by the falling of the bank during such absence, the fact that he knew of the superintendent's absence and continued to work without objection will not prevent his recovery. The question is at least one for the jury to determine.[1]

§ 247. Assumption of the risk of a negligent order given by a superintendent.—If the safety of the employee requires the defendant's superintendent to give an order and he negligently fails to give such an order, the jury may find that the plaintiff, if injured by such omission on the part of the superintendent, has not assumed the risk arising from such conduct and is entitled to recover from the common employer.

In Cavagnaro v. Clark (Mass.)[2] there was evidence that the plaintiff was employed in carrying bricks in a wheelbarrow to masons at work in the building; that after delivering the load of bricks he returned with his empty wheelbarrow for the purpose of descending with it on the elevator; that the defendant's superintendent was standing on the elevator as he approached it, and that he asked the superintendent if he had room to put his wheelbarrow on the elevator, and the superintendent replied there was not much room. The plaintiff then placed his wheelbarrow on the elevator and had one foot on it when it started down, causing him to fall. The superintendent gave the order to start the elevator and did not countermand this order before the plaintiff stepped on to the elevator. It was held that if in giving the signal to start the elevator the superintendent had reason to suppose that the plaintiff was about to attempt to put his wheelbarrow upon the platform and failed to countermand the order to start the elevator downward or take some means to pre-

[1] Lynch v. Allyn, 160 Mass. 248; 35 N. E. 550.
[2] 171 Mass. 359; 50 N. E. 542.

vent an injury to the plaintiff whom he knew was about to place himself in a dangerous position, this would be an act of superintendence on his part, and if negligently performed it would not be such an act as the plaintiff would assume the risk of, and that therefore a verdict in favor of the plaintiff was properly returned.

In O'Brien v. Nute-Hallett Co. (Mass.)[1] the plaintiff was injured by getting into a dark bin in accordance with the order of the defendant's superintendent. The plaintiff and the superintendent examined the bin from the outside, and the superintendent ordered the plaintiff to come away from the bin, and afterwards ordered the plaintiff to get into the bin and go to work. The plaintiff informed the superintendent that he could not see the bottom of the bin and that it was very dark inside. The superintendent then told the plaintiff that it was all right, and ordered him to get into the bin, which the plaintiff did, and instead of landing on the floor or bottom of the bin he fell astride a joist and was injured. It was held in an action under the Employers' Liability Act that the superintendent was negligent in ordering the plaintiff into the bin, and that the plaintiff did not assume the risk of such an injury.[2]

Where the danger in the case arises wholly from an isolated act of carelessness on the part of a superintendent, an ordinary workman injured thereby will not be held as matter of law to have assumed the risk. Such a danger does not naturally grow out of the employment and is not necessarily incident to it. In Millard v. West End St. R. Co. (Mass.)[3] the plaintiff was injured by the fall or collapse of a pile of lumber which had been erected

[1] 177 Mass. 422; 59 N. E. 65.
[2] For other cases upon this point, see ante, § 96 and cases cited.
[3] 173 Mass. 512; 53 N. E. 900.

under the supervision of one Smith, the defendant's superintendent, who negligently ordered it to be done in a way which would be likely to cause it to tumble down and who persisted in doing the job in that way after his attention had been called to the matter. The pile was intended to remain but a short time, as the timbers were to be used in repairing a wharf. The plaintiff had been working for two days near the pile of lumber building a fence, but he knew nothing about the manner in which the pile was built until the moment of the injury. Smith ordered the plaintiff to get upon the pile of lumber, telling him "to get up there quick and throw that piece of timber into the water." In obedience to this order the plaintiff got upon the pile, and just as he started to pry off the piece of timber the pile gave way, causing the plaintiff's injuries. The trial judge ordered a verdict for the defendant upon the ground that the plaintiff had assumed the risk, but the supreme court held that there was no assumption of risk as matter of law, and said that it would be going too far to hold that the plaintiff should have known that the pile was dangerous when such danger was not apparent to the superintendent; and that when the plaintiff received the sudden order to go upon the pile he was not bound at his peril to inspect it or to ascertain whether it was safe or not. "To say as matter of law that the plaintiff assumed the risk in this case is going further than the court has gone in this class of cases and further than we think it ought to go. The danger in this case was owing wholly to an isolated act of carelessness on the part of the superintendent. This is not a danger which naturally grows out of the employment or is necessarily incident to it."[1]

[1] Per Mr. Justice Lathrop, page 514; citing Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. 501; McKee v. Tourtelotte, 167 Mass. 69; 44 N. E. 1071; Davis v. New York &c. R. Co., 159 Mass. 532; 34 N. E. 1070.

If an action for such an injury had been brought at common law instead of under the Employers' Liability Act, the plaintiff could not have recovered.[1]

In Massachusetts, however, this rule has been modified in the case of an experienced workman, who understands and appreciates the danger as well as the superintendent, and who has not received any assurance of safety. In this case, the circumstance that the superintendent has given a negligent order during the progress of the work will not justify a verdict for the plaintiff, and the employee must be held, as matter of law, to have assumed the risk.[2]

In Kanz v. Page (Mass.)[3] the defendant's superintendent sent the plaintiff into a room, which had been recently shattered by the explosion of a fly-wheel, to clear away the rubbish. While doing this work on the day of the explosion, a piece of iron fell from the ceiling of the room upon the plaintiff's head. The defendant had not caused any previous inspection of the room's safety, and the plaintiff was not inspecting the room, or repairing the damage, but merely clearing out the rubbish. It was held that a verdict was rightly ordered for the defendant, upon the ground that the risk was both transitory and obvious, "or at least equally easy to be discovered by employer and employed" (p. 218, per Holmes, J., for the court, who added on page 219: "Some one must be first in the place of possible danger. The workman sent in to clean it up has no right to assume that he is not the first, nor is the employer bound in formal language to notify him that no one as yet has made certain that nothing will give way").

[1] Reagan v. Lombard, 181 Mass. —; 63 N. E. 895 (1902).

[2] Tanner v. New York &c. R. Co., 180 Mass. 572; 62 N. E. 903 (1902); Allard v. Hildreth, 173 Mass. 26; 52 N. E. 1061. In this decision it is not entirely clear whether the court meant to base the judgment upon assumption of risk or contributory negligence.

[3] 168 Mass. 217; 46 N. E. 620.

If, however, the plaintiff be set to work in a place which the superintendent knows or has reason to know is dangerous, and assures the plaintiff that it is safe, or "all right" to work there, and the plaintiff is afterward injured by the happening of the event anticipated by the plaintiff, the jury will be warranted in finding that the superintendent was negligent and that the plaintiff did not assume the risk.[1]

§ 248. Common-law rule.—At common law the employee was held to assume the risk of injury from the negligence of a superintendent,[2] as well as from an obvious defect in the condition of the ways, works, or machinery,[3] and could not recover of his employer in either case. Thus, in Albro v. Agawam Co. (Mass.),[4] a spinner was injured through the negligence of a superintendent. In an action at common law it was held that the common employer was not liable in damages to the spinner, for the following reasons, as stated by Mr. Justice Fletcher for the court on pages 76, 77: "This case can not be distinguished in principle from the case of Farwell v. Boston &c. R. Co. (Mass.),[5] and the same point has been since adjudged in the case of Hayes v. Western R. Co. (Mass.).[6] The principle of these decisions is, that

[1] Burgess v. Davis Sulphur Ore Co., 165 Mass. 71; 42 N. E. 501. (Plaintiff while drilling rock was injured by a large piece of overhanging rock falling upon him, after the superintendent had said, in answer to plaintiff's question: "Yes, it is all right,—we tried to bar down some rock and it would not come.") See also, Cote v. Lawrence Mfg. Co., 178 Mass. 295; 59 N. E. 656 (1901).

[2] Moody v. Hamilton Mfg. Co., 159 Mass. 70; 34 N. E. 185; 38 Am. R. 396; Kalleck v. Deering, 161 Mass. 469; 37 N. E. 450; 42 Am. St. 421; Zeigler v. Day, 123 Mass. 152; Albro v. Agawam Co., 6 Cush. (Mass.) 75; Floyd v. Sugden, 134 Mass. 563.

[3] Rooney v. Sewall Cordage Co., 161 Mass. 153; 36 N. E. 789; Goldthwait v. Haverhill &c. R. Co., 160 Mass. 554; 36 N. E. 486.

[4] 6 Cush. (Mass.) 75.

[5] 4 Met. (Mass.) 49; 38 Am. D. 339.

[6] 3 Cush. (Mass.) 270.

when one person engages in the service of another he undertakes, as between him and his employer, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of others in the service of the same employer, whenever he, such servant, is acting in the discharge of his duty to his employer, who is the common employer of both. * * * It can not affect the principle that the duties of the superintendent may be different, and perhaps may be considered as of a somewhat higher character than those of the plaintiff. * * * The plaintiff and the superintendent must be considered as fellow servants within the principle and meaning of the cases above referred to, and the other adjudged cases on this subject."

So, in Zeigler v. Day (Mass.)[1] where a laborer, while digging a sewer-trench, was injured through the negligence of a superintendent, it was held that he could not recover of the common employer, because "such negligence is regarded as among the ordinary risks of the employment in which he was engaged."[2]

A like rule has been applied to the negligence of a mate or captain of a vessel in harbor; and in actions at common law against the owner of the vessel for personal injuries to a common sailor it has been decided that the mate and captain were no more than fellow servants with the sailor, and that the latter assumed the risk of injury from their negligence, and could not recover of the common employer.[3]

At common law, in Massachusetts and elsewhere, an employee, who, knowing that his foreman was incompe-

[1] 123 Mass. 152.

[2] Per Colt, J., for the court, page 153.

[3] Kalleck v. Deering, 161 Mass. 469; 37 N. E. 450; 42 Am. St. 421; Benson v. Goodwin, 147 Mass. 237; 17 N. E. 517; Loughlin v. State, 105 N. Y. 159; 11 N. E. 371; Hedley v. Pinkney Steamship Co., (1892) 1 Q. B. 58.

tent, continued to work under him and made no complaint to the employer, was deemed to have assumed the risk, and could not maintain an action against the employer for an injury caused by the negligence of the foreman.[1]

C.

§ 249. Negligence of one having charge or control of signal, switch, locomotive-engine, or train upon a railroad.—An employee of a railroad company does not assume the risk of the negligence of "any person in the service of the employer who has the charge or control of any signal, switch, locomotive-engine, or train upon a railroad." The Massachusetts statute makes the railroad company liable to its employees for the negligence of such persons, and if the common-law doctrine of assumption of risk were applied to such cases the statute would be nullified. An employee may therefore recover of the railroad company for an injury caused by such negligence.[2]

An employee may be guilty of such contributory negligence as will bar a recovery under this clause of the Employers' Liability Act, but he does not assume the risks incident to the negligence of a person in charge and control of a railroad-car, or other railroad-appliances and instrumentalities mentioned in the Alabama act. To sustain assumption of risk as a defense in these cases would be to "emasculate the Employers' Liability Act in respect of its second, third and fifth clauses, and to rehabilitate the common-law doctrine of fellow servants as applicable to the cases provided for in those clauses, when the clear

[1] Hatt v. Nay, 144 Mass. 186; 10 N. E. 807; Davis v. Detroit &c. R. Co., 20 Mich. 105; 4 Am. R. 364; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104; 80 Am. D. 467.

[2] Steffe v. Old Colony R. Co., 156 Mass. 262; 30 N. E. 1137; Cowen v. Ray, 108 Fed. 320 (1901).

purpose of the act is to destroy the defense of assumption of risk by the injured employee in the several cases stated in the counts referred to."[1]

The Alabama act applies to a "car" as well as to any signal, points, locomotive, engine, switch, or train upon a railway, or of any part of the track of a railway, and is therefore broader in terms than the corresponding clause in the Massachusetts act.

It is actionable negligence on the part of a person in charge of a hand-car to order it propelled at a high rate of speed into a dangerous part of the track covered with smoke in the railroad-yard where a switch-engine is accustomed to run at all times, and if an employee working at the levers in propelling the hand-car is injured by a collision with the switch-engine, he is entitled to recover damages under the Alabama act.[2]

D.

§ 250. Negligence of person to whose orders plaintiff was bound to conform.—In Indiana and Alabama it has been decided that an employee by entering the service does not assume the risk of personal injury arising from the negligence of a person to whose orders he was bound to conform and did conform at the time of injury. To hold that the inferior employee, as matter of law, assumed the risk of the negligence of such superior person would be to "emasculate the Employers' Liability Act," and "to rehabilitate the common-law doctrine of fellow servants," contrary to the clear purpose of the statute.[3]

[1] Woodward Iron Co. v. Andrews, 114 Ala. 243, 257; 21 So. 440, per McClellan, J.; citing Reno Emp. L. Acts (1st ed.), § 190.

[2] Woodward Iron Co. v. Andrews, 114 Ala. 243; 21 So. 440 (1897).

[3] Woodward Iron Co. v. Andrews, 114 Ala. 243, 257; 21 So. 440, citing Reno Employers' Liability Acts (1st ed.), § 190; Terre Haute &c. R. Co. v. Rittenhouse 28 Ind. App. 633; 62 N. E. 295, 299, also citing with approval the first edition of this work, § 190.

Assumption of risk arising from the negligence of a coemployee is no defense to actions under the Employers' Liability Acts or Fellow-Servant Acts, when the negligent coemployee falls within the class of persons for whose negligence the statutes make the common employer liable to the injured employee. The effect of the statutes is to abolish this defense in this class of actions.[1]

[1] Southern R. Co. v. Johnson, 114 Ga. 329; 40 S. E. 235 (1901).

CHAPTER XVI.

CONFLICT OF LAWS.

SECTION

251. Action outside the state of injury upon statute of the state of injury.
252. Same—Not necessary that the state of process should give a remedy for such injury.
253. Public policy.
254. Such statutes are not "penal" laws.
255. Statute of state of process does not apply to injuries caused and received outside of that state.
256. Negligence in one state causing injury in another state.
257. Injuries received on navigable waters.
258. Limit and measure of damages recoverable.
259. Procedure governed by lex fori.
260. When law of place of injury controls.

§ 251. Action outside the state of injury upon statute of the state of injury.—In most jurisdictions the rule is now firmly established that an action for personal injuries received in one state may be maintained in another state, or in the federal courts sitting in another state, founded upon a statute of the former state, unless such statute is contrary to the public policy of the latter state.[1]

[1] Hilton v. Alabama &c. R. Co., 97 Ala. 275; 12 So. 276; Knight v. West Jersey R. Co., 108 Pa. St. 250; 56 Am. R. 200; Higgins v. Central New England R. Co., 155 Mass. 176; 29 N. E. 534; 31 Am. St. 544; Herrick v. Minneapolis &c. R. Co., 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; Morris v. Chicago &c. R. Co., 65 Iowa 727; 23 N. W. 143; 54 Am. R. 39; McLeod v. Connecticut &c. R. Co., 58 Vt. 727; 6 Atl. 648; South Carolina R. Co. v. Nix, 68 Ga. 572; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848; 40 N. W. 401; McDonald v. McDonald, 96 Ky. 209; 16 Ky. L. 412; 28 S. W. 482; 49 Am. St. 289; Burns v. Grand Rapids &c. R. Co., 113 Ind. 169; 15 N. E. 230; Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; 20 N. E. 287.

This rule is applicable to actions in one state brought under the Employers' Liability Act of another state. That the state of action does not render the common employer liable to an employee injured by reason of the negligence of a superintendent, or of a person in charge or control of certain railroad-appliances, etc., does not show that the Employers' Liability Act of another state which allows a recovery for the negligence of such coemployees is contrary to the public policy of the forum. This point was adjudged by the supreme court of Illinois in an action based upon the Indiana Employers' Liability Act.[1]

In the leading case of Dennick v. Railroad Co.[2] the plaintiff's intestate was instantly killed in New Jersey, through the negligence of the defendant railroad company. A statute of New Jersey gave an administrator a right of action in such case against the railroad company, for the benefit of the widow and next of kin. The plaintiff, the widow of the deceased, was appointed administratrix in New York, and the action was brought in a court of that state, and afterwards removed by the defendant, on the ground of diverse citizenship, to the circuit court of the United States for the district of New York. The trial court ruled that the plaintiff could not recover in New York under the New Jersey statute. In reversing this judgment, the supreme court, speaking through Mr. Justice Miller, says, on pages 17 and 18:

"It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the state where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the state; but when the act is

[1] Chicago &c. R. Co. v. Rouse, 178 Ill. 132; 52 N. E. 951 (1899); disapproving (p. 136) Anderson v. Milwaukee &c. R. Co., 37 Wis. 321.

[2] 103 U. S. 11; 1 Am. & Eng. R. Cas. 309.

done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we can not see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process, or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

This rule has been reaffirmed several times by the supreme court of the United States.[1] Some of the state courts whose earlier decisions were of a contrary tendency have since this decision either overruled or modified them so as to conform to this rule.[2]

§ 252. Same—Not necessary that the state of process should give a remedy for such injury.—Where the state of injury gives a right of action for the personal injury received, it is not necessary to a recovery that the state of process should concur in giving a remedy for a like injury within its limits. The authorities, however, are not uniform upon this subject.

[1] Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 S. Ct. 905; Huntington v. Attrill, 146 U. S. 657, 675; 13 S. Ct. 224; Northern Pac. R. Co. v. Babcock, 154 U. S. 190; 14 S. Ct. 978.

[2] Higgins v. Central New England R. Co., 155 Mass. 176, 178; 29 N. E. 534; 31 Am. St. 544; modifying Richardson v. New York Cent. R. Co., 98 Mass. 85.

In the case of Walsh v. New York &c. R. Co. (Mass.)[1] a railroad-employee was injured in Connecticut by the negligence of a car-inspector in failing to discover a broken draw-bar on a foreign car which the defendant was forwarding. At the time when the injury was received, before the passage of the Massachusetts statute 1893, ch. 359, the plaintiff could not have recovered in Massachusetts if the injury had been received in that state.[2] But by the law of Connecticut, as proved at the trial and found by the jury, the plaintiff could recover in that state. The Massachusetts court held that he could recover in Massachusetts, upon the principles of interstate comity. Mr. Justice Holmes, in delivering the opinion of the court, says: "We are of opinion that, as between the states of this Union, when a transitory cause of action has vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent the enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties."[3]

As stated by the supreme court of the United States, it was decided in Dennick v. Railroad Co.[4] that "a statute of a state * * * might be enforced in a circuit court of the United States held in another state, *without regard to the question whether a similar liability would have attached for a similar cause in that state.*"[5]

In an action brought in the circuit court of the United States sitting in Vermont for a personal injury sustained

[1] 160 Mass. 571; 36 N. E. 584; 39 Am. St. 514.

[2] Mackin v. Boston &c. R. Co., 135 Mass. 201; 46 Am. R. 456; Coffee v. New York &c. R. Co., 155 Mass. 21; 28 N. E. 1128.

[3] Walsh v. New York &c. R. Co., supra, at pp. 572, 573.

[4] 103 U. S. 11; 1 Am. & Eng. R. Cas. 309.

[5] Huntington v. Attrill, 146 U. S. 657, 675; 13 S. Ct. 224.

in Canada by an employee of the defendant railroad company, where the defense was that the injury was caused by the negligence of a fellow servant, which would have prevented a recovery if the injury had been sustained in Vermont, it was held that the plaintiff could recover because in Canada the negligence of a fellow servant was no defense, and that this was a matter relating to the right of action itself, and not merely to the remedy.[1] That the contract for services between the defendant railroad company and a locomotive-engineer was made in Vermont and partly performed in Vermont, where the fellow-servant rule prevails, does not show that the engineer assumed the risk of injury incident to the negligence of his fellow servants in Canada on so much of his run as lay within that country; and a statute of Canada allowing a recovery for negligence of fellow servants will be enforced in the federal court sitting in Vermont.[2]

So likewise it was held in Illinois Cent. R. Co. v. Harris (Miss.),[3] that the fellow-servant rule of the state of injury controlled in actions brought in other states.

In England, however, and in a few of the state courts, the rule appears to be that no action can be maintained outside of the state of injury unless the law of the state of process concurs with the law of the place of injury in giving a right of action.[4] With respect to the English cases just cited, see the opinion of Mr. Justice Holmes in Walsh v. New York &c. R. Co. (Mass.),[5] where he says: "Pos-

[1] Boston &c. R. Co. v. M'Duffey, 79 Fed. 934; 25 C. C. A. 247 (1897).
[2] Boston &c. R. Co. v. M'Duffey, 79 Fed. 934; 25 C. C. A. 247 (1897).
[3] 79 Miss. —; 29 So. 760 (1901).
[4] The Halley, L. R. 2 P. C. 193, 204; The M. Moxham, 1 P. D. 107, 111; Phillips v. Eyre, L. R. 6 Q. B. 1, 28, 29; Ash v. Baltimore &c. R. Co., 72 Md. 144; 19 Atl. 643; 20 Am. St. 461; Vawter v. Missouri Pac. R. Co., 84 Mo. 679; 54 Am. R. 105 (but see Stockman v. Terre Haute &c. R. Co., 15 Mo. App. 503); Anderson v. Milwaukee &c. R. Co., 37 Wis. 321.
[5] 160 Mass. 571, 572; 36 N. E. 584; 39 Am. St. 514.

sibly, when it becomes material to scrutinize the question more closely, the English law will be found to be consistent with our views;" and see also Machado v. Fontes.[1]

§ 253. Public policy.—Although it is true in general, as shown in section 252, that it is not necessary to a recovery that the laws of the state of injury and of the state of process should concur in giving a remedy for the negligent act, yet it is also well settled that no recovery can be had if the right given by the state of injury is contrary to the public policy of the state of process. The only doubtful question is, What is or is not contrary to the public policy of the state of process?

In the first place, it is very clear that the mere fact that no statute exists in the state of process, conferring a right of action for the injury received in another state, does not render the statute of such other state contrary to the public policy of the former state, nor prevent its enforcement therein.[2] In Herrick v. Minneapolis &c. R. Co. (Minn.)[3] it was held that a railroad-employee who had received an injury in Iowa, in consequence of the negligence of a fellow servant, could recover in Minnesota under the Iowa statute, although he could not have recovered there if the injury had been received in that state. In delivering the opinion of the court, Mr. Justice Mitchell says, on pages 14, 15: "But it by no means follows that, because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. * * * To justify a court in refusing to

[1] (1897) 2 Q. B. 231. This subject is further discussed in § 30, ante.

[2] Herrick v. Minneapolis &c. R. Co., 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771; Walsh v. New York &c. R. Co., 160 Mass. 571; 36 N. E. 584; 39 Am. St. 514; Texas &c. R. Co. v. Cox, 145 U. S. 593; 12 S. Ct. 905; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 198; 14 S. Ct. 978.

[3] 31 Minn. 11; 16 N. W. 413.

enforce a right of action which accrued under the laws of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens."

An action may be brought in one state for a personal injury received in another state whose statute gives a right of action therefor, if the laws of the two states are substantially alike; it is not essential that the statutes should be precisely the same.[1] In Stewart v. Baltimore &c. R. Co.[2] the plaintiff's intestate was killed by defendant's negligence in the state of Maryland and brought this action in the District of Columbia. Under the law of Maryland the action should be brought in the name of the state as the nominal plaintiff for the benefit of the wife, husband, parent or child of the person killed, while under the law of the District of Columbia the action must be brought in the name of the personal representative of the deceased, and the damages be distributed according to the statute of distributions. It was held that the Maryland statute was not contrary to the public policy of the District of Columbia, and that the action could be maintained in the name of the administrator, and that the damages should go to the persons named in the Maryland act.

Where, however, the action is brought by a domestic executor or administrator for an injury received in an-

[1] Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; 38 Am. R. 491.
[2] 168 U. S. 445; 18 S. Ct. 105.

other state resulting in the death of his testator or intestate, and a statute of the state of process prohibits an executor or administrator from bringing an action for injuries to the person of the deceased, it has been held that he can not maintain an action under the foreign statute, because he is bound by the laws of the state of his appointment, and can not exercise any rights contrary to those conferred by that state.[1] Nor can an executor or administrator appointed in a state having such a law maintain an action in another state, although the killing occurred in the latter state and its statutes give a remedy therefor, and a foreign executor or administrator is allowed to sue in its courts. The reason assigned is that an administrator takes such powers only as are conferred by the laws of the appointing state, and can not exercise any greater powers in another state.[2] Upon analogous grounds it has also been decided that a domestic administrator or executor could not maintain an action for an injury to the person of his deceased, under a foreign statute, which was not permitted by the statutes of his own appointing state, although they did not expressly prohibit him from so doing; he must be able to show that the laws of his state entitle him to recover, and it is not sufficient for him to show that they do not prohibit his recovery.[3]

§ 254. **Such statutes are not "penal" laws.**—"The courts of no country execute the penal laws of another."[4] Hence the federal courts have no power to execute the penal laws of the individual states,[5] even if the liability

[1] Vawter v. Missouri Pac. R. Co., 84 Mo. 679; 54 Am. R. 105.

[2] Limekiller v. Hannibal &c. R. Co., 33 Kan. 83; 5 Pac. 401; 52 Am. R. 523.

[3] Taylor v. Pennsylvania R. Co., 78 Ky. 348; Ash v. Baltimore &c. R. Co., 72 Md. 144; 19 Atl. 643.

[4] The Antelope, 10 Wheat. 66, 123, per Marshall, C. J.

[5] Huntington v. Attrill, 146 U. S. 657, 673; 13 S. Ct. 224; Gwin v. Breedlove, 2 How. 29, 36, 37; Gwin v. Barton, 6 How. 7.

has been reduced to judgment; for "the essential nature and real foundation of a cause of action are not changed by recovering judgment upon it."[1] Nor can the state courts enforce the penal laws of the United States,[2] nor of sister states.[3]

A penal law in this sense has been thus defined by Mr. Justice Gray, speaking for the court, in Huntington v. Attrill:[4] "The question whether a statute of one state, which in some respects may be called penal, is a penal law in the international sense, so that it can not be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick v. Railroad Co."[5]

It follows from the distinction pointed out in the preceding quotation that a state Employers' Liability Act which enlarges the common-law liability of employers for personal injury, and gives an employee a right of action for negligence which he did not possess before the passage of the statute, is not a penal law in the international sense, so as to prevent its enforcement in the courts of other states or in the federal courts. To give effect to

[1] Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 293; 8 S. Ct. 1370; disapproving Spencer v. Brockway, 1 Ohio 259; 13 Am. D. 615; Healy v. Root, 11 Pick. (Mass.) 389, and Indiana v. Helmer, 21 Iowa 370.

[2] State v. Pike, 15 N. H. 83; Ely v. Peck, 7 Conn. 239; Ward v. Jenkins, 10 Met. (Mass.) 583, 587; Delafield v. Illinois, 2 Hill (N. Y.) 159, 169; Scoville v. Canfield, 14 Johns. (N. Y.) 338; 7 Am. D. 467; United States v. Latrop, 17 Johns. (N. Y.) 4.

[3] Davis v. New York &c. R. Co., 143 Mass. 301; 9 N. E. 815; 58 Am. R. 138; Commonwealth v. Green, 17 Mass. 515, 540, 541; Scoville v. Canfield, 14 Johns. (N. Y.) 338; 7 Am. D. 467; State v. Knight, Taylor (N. C.) 65.

[4] 146 U. S. 657, 673, 674; 13 S. Ct. 224.

[5] 103 U. S. 11; 1 Am. & Eng. R. Cas. 309.

such a statute of another state is not to administer a punishment imposed upon an offender against the state, but merely to afford a private remedy to an employee who has been injured by the negligent act. Such a statutory right will therefore be enforced in other states upon the principles of interstate comity, unless it is repugnant to their public policy.

The facts that the statute limits the amount recoverable to a certain sum, and, in case the injury results in death, provides for its payment to the widow, or next of kin, or other person, thereby withdrawing the fund from the assets for the payment of debts, and from the operation of the will of the injured person, do not render the action one for the recovery of a penalty, so as to prevent its enforcement in another state.[1]

In Adams v. Fitchburg R. Co. (Vt.)[2] it was held, however, that section 212 of Massachusetts public statutes, chapter 112, was penal and not enforceable in Vermont, chiefly because it declares that the amount recoverable in case of death shall be not less than $500. In Perkins v. Boston &c. R. Co.,[3] it was decided that Massachusetts Pub. Sts., ch. 112, § 212, as amended by statute of 1883, chapter 243, is a penal statute in the international sense and can not be enforced in the courts of another sovereignty.[4]

Where a statute provided that where the death of any person was caused by the negligence of the railroad's agents or servants, the railroad should forfeit and pay the sum of five thousand dollars to his widow or children, it was held that the act was penal in its nature and would not be enforced in another state, because the act provided in

[1] Higgins v. Central New England &c. R. Co., 155 Mass. 176, 181; 29 N. E. 534; 31 Am. St. 544.

[2] 67 Vt. 76; 30 Atl. 687; 48 Am. St. 800.

[3] 90 Fed. 321.

[4] See also, Lyman v. Boston &c. R. Co., 70 Fed. 409 (1895).

effect that the recovery must be five thousand dollars or nothing, and the damages could not be assessed with reference to the degree of culpability of the railroad company.[1]

§ 255. Statute of state of process does not apply to injuries caused and received outside of that state.—An Employers' Liability Act, or other similar statute of one state, does not give a right of action for a personal injury caused and received in another state, unless such intention is clearly expressed in the statute. Its operation is confined to the enacting state. An employee who is injured in another state can not recover under the Employers' Liability Act of his own state.[2]

In the Alabama case above cited[3] a freight-brakeman received an injury in Mississippi by reason of the negligence of an inspector in Alabama in failing to discover a defective link in a foreign car. Under the Alabama Employers' Liability Act the employee could have recovered if the injury had occurred in that state. In Missis-

[1] Dale v. Atchison &c. R. Co., 57 Kan. 601; 47 Pac. 521. See also, Marshall v. Wabash R. Co., 46 Fed. 269 (1891).

[2] Alabama &c. R. Co. v. Carroll, 97 Ala. 126; 11 So. 803; 38 Am. St. 163; 18 L. R. A. 433; Young v. Boston &c. R. Co., 168 Mass. 219, 220; 46 N. E. 624 (1897). See also, Stewart v. Baltimore &c. R. Co., 168 U. S. 445; 18 S. Ct. 105. To the same effect, under similar statutes, are the cases of Debevoise v. New York &c. R. Co., 98 N. Y. 377 (1885); Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; 20 N. E. 287 (1888); Railway Co. v. Lewis, 89 Tenn. 235; 14 S. W. 603 (1890); McCarthy v. Chicago &c. R. Co., 18 Kan. 46; Nashville &c. R. Co. v. Foster, 10 Lea (Tenn.) 351; Chicago &c. R. Co. v. Doyle, 60 Miss. 977; Kahl v. Memphis &c. R. Co., 95 Ala. 337; 10 So. 661; Le Forest v. Tolman, 117 Mass. 109; Davis v. New York &c. R. Co., 143 Mass. 301; 9 N. E. 815; 58 Am. R. 138; State v. Pittsburg &c. R. Co., 45 Md. 41; Willis v. Missouri Pac. R. Co., 61 Tex. 432; 48 Am. R. 301; Hover v. Pennsylvania R. Co., 25 Ohio St. 667; Needham v. Grand Trunk R. Co., 38 Vt. 294; Smith v. Condry, 1 How. 28; Phillips v. Eyre, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1.

[3] Alabama &c. R. Co. v. Carroll, 97 Ala. 126; 11 So. 803; 38 Am. St. 163; 18 L. R. A. 433.

sippi there was no such statute, and by its common law the inspector and brakeman were considered fellow servants, for whose negligence the common employer was not liable to either for the other's act. The Alabama court held that the plaintiff could not recover under the statute.

In delivering the opinion of the court in Alabama &c. R. Co. v. Carroll, just cited, Mr. Justice McClellan says: "Section 2590 of the code, in other words, is to be interpreted, in the light of universally-recognized principles of private international or interstate law, as if its operation had been expressly limited to this state, and as if its first line read as follows: 'When a personal injury is *received in Alabama* by a servant or employee,' etc. The negligent infliction of an injury here under statutory circumstances creates a right of action here, which, being transitory, may be enforced in any other state or country the comity of which admits it; but for an injury inflicted elsewhere than in Alabama our statute gives no right of recovery, and the aggrieved party must look to the local law to ascertain what his rights are."

The fact that the person injured in another state is a citizen of the state of process, or that the contract was made in the state of process, does not alter the result. The statute of the state of process will not be construed to apply to an injury received outside the state, and no action can be maintained upon it therein unless such intention is clearly and unequivocally expressed in the statute.[1]

In Whitford v. Panama R. Co. (N. Y.), just cited, the plaintiff's intestate was killed in New Granada while crossing the Isthmus of Panama as a passenger of the defendant railroad company. The action was brought under the

[1] McCarthy v. Chicago &c. R. Co., 18 Kan. 46; 26 Am. R. 742; Needham v. Grand Trunk R. Co., 38 Vt. 294; Whitford v. Panama R. Co., 23 N. Y. 465; State v. Pittsburg &c. R. Co., 45 Md. 41.

New York statutes of 1847 and 1849, giving a right of action for a wrongful act, neglect or default resulting in death. The corporation was chartered by New York for the purpose of operating a railroad in New Granada, and the contract for carriage was made in New York. It was held that the action could not be maintained because the New York statutes did not apply where the injury was committed or received outside of that state.

Where the common law of the state of process gives no remedy for a personal injury, the presumption in that state is that the same rule prevailed in the other state where the injury occurred. The fact that the state of process has given a remedy by statute does not create a presumption that a remedy existed in the other state, either at common law or by statute. The plaintiff must allege and prove that the law of the state of injury gave a remedy for the injury, otherwise he will fail in his action.[1]

The rule, however, that such statutes do not apply to injuries received in other states is merely a matter of statutory construction and not of constitutional power, at least where the injured person is a citizen of the state, according to the prevailing view, though the contrary has been decided in Indiana.[2]

§ 256. Negligence in one state causing injury in another state.—Even if the Employers' Liability Act of the state in which the negligence occurs gives a remedy therefor, it has been held that no action can be maintained therein if the injury is received in another state where no remedy exists. This point was directly decided in Ala-

[1] Debevoise v. New York &c. R. Co., 98 N. Y. 377; 50 Am. R. 683; State v. Pittsburg &c. R. Co,, 45 Md. 41; Selma &c. R. Co. v. Lacy, 43 Ga. 461; Hyde v. Wabash &c. R. Co., 61 Iowa 441; 16 N. W. 351; 47 Am. R. 820; Nashville &c. R. Co. v. Eakin, 6 Coldw. (Tenn.) 582; McCarthy v. Chicago &c. R. Co., 18 Kan. 46, 49; 26 Am. R. 742.

[2] Ante, §§ 29, 30.

bama &c. R. Co. v. Carroll (Ala.),[1] which was an action under the Alabama Employers' Liability Act for an injury received in Mississippi caused by negligence committed in Alabama.

In answer to the argument that the act of Alabama governed the rights and liabilities of the parties because the negligent act occurred in Alabama, the court says on page 134: "It is admitted, or at least can not be denied, that negligence of duty unproductive of damnifying results will not authorize or support a recovery. Up to the time the train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue—the injury without which confessedly no action would lie anywhere—transpired in the state of Mississippi. It was in that state therefore, necessarily, that the cause of action, if any, arose; and whether a cause of action arose and existed at all or not must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired."[2]

[1] 97 Ala. 126; 11 So. 803; 38 Am. St. 163; 18 L. R. A. 433.

[2] With all due respect to this learned court, its conclusion seems to give too much weight to the place of injury, and too little weight to the place where the negligence occurred. It is true that negligence without injury gives no right of action, but it is equally true that injury without negligence gives no right of action. Hence, when the two occur in different states, it is not perceived why, in determining which state law should govern the case, more weight should be given to the place of injury than to the place of negligence. On the contrary, as the action is based upon negligence, it would seem that more weight should be given to the law of the place of negligence than to the law of the place of injury. Suppose that these facts had been reversed in the above Alabama case, and that the negligence had occurred in Mississippi and the injury in Alabama, all the other facts remaining the same, would the Alabama court have held that the action was governed by the law of Alabama, and allowed a recovery under the Alabama Employers' Liability Act, although no recovery could have been had under the law of Mississippi? Again, suppose the action were brought

The judgment in the lower court had been in favor of the plaintiff, and after this judgment of reversal by the

in a third state, different from the state of negligence and from that of the injury, would the Employers' Liability Act of the state of negligence be recognized and enforced in such third state, or would the Employers' Liability Act of the state of injury be recognized and enforced in such third state? If not, it follows that no action can be maintained under the statute in any state.

The Alabama court cites two cases in support of this view, namely, Nashville &c. R. Co. v. Foster, 10 Lea (Tenn.) 351, and Chicago &c. R. Co. v. Doyle, 60 Miss. 977. In the Tennessee case a brakeman in the defendant's employ was killed in Alabama, and the amended declaration claimed to recover under an Alabama statute of February 5, 1872. The negligent act complained of occurred in Tennessee, and consisted in the failure of a car-inspector to discover and remedy a defective brake-nut on a railroad-car. In attempting to use the brake, the wheel came off in the hands of the deceased, and he was thrown from the car and run over. It was assumed that by the law of Tennessee the plaintiff could have recovered if the injury had been received in that state, and it was found as a fact that under the Alabama law no recovery could be had, because the car-inspector and brakeman were considered fellow servants. It was held that the case was governed by the law of Alabama, where the injury occurred, and that the plaintiff could not recover in this action in Tennessee. In this case, however, the plaintiff claimed to recover only under the Alabama statute, and the question as to which law should control was therefore not necessarily involved in the decision.

In the Mississippi case (Chicago &c. R. Co. v. Doyle, 60 Miss. 977) a locomotive-engineer in the employ of the defendant railroad was killed in Tennessee through the alleged negligent omission of duty in Mississippi of another employee of the road. The statutes of both states were substantially alike, and allowed a recovery for the negligent killing of a human being under certain circumstances. The proximate cause of the injury was the negligence of a fellow servant of the deceased, and it was therefore held that the plaintiff could not recover under the statute of either state. The court, however, says on page 984, through Mr. Chief Justice Campbell: "The right of the appellee is determinable by the law of Tennessee, in which state the killing of her husband occurred. * * * Physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and vice versa; but the omission of some duty in Mississippi can not transfer a consequence of it, manifested physically in another state, to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our view on this subject. The true view is that the

supreme court of Alabama the plaintiff voluntarily discontinued his action in the state court, and within a year brought another action for the same cause in a federal court where he recovered a verdict of $15,000, upon which judgment was entered. The circuit court of appeals reversed this judgment and ordered a new trial for various reasons, but not upon the ground that the happening of the accident in Mississippi, after negligence committed in Alabama, showed that the action was not controlled by the law of Alabama. In fact the court held that the statute of limitations of Alabama applied to the action, and that it was not barred, because the new action was brought in the federal court within one year after reversal of the judgment in the state court.[1]

In Louisville &c. R. Co. v. Williams (Ala.)[2] the defendant's wrongful act which occasioned the death of the plaintiff's intestate, was committed in Tennessee, which state had no statute giving a right of action for death, so far as appeared in this suit, and this action was founded upon the Alabama statute. It appeared that the death occurred in Alabama, but it did not appear in which state

legal entity called the corporation is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which any officer or employee was stationed for duty. The question is as to duty operating effectually at the place where its alleged failure caused harm to result. The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used."

The court seems to have allowed a fiction concerning the omnipresence of the railroad to control and overcome the fact that the negligence occurred in Mississippi. If the proof shows that the negligence occurred in Mississippi, it seems absurd to hold that the corporation was remiss in duty in Tennessee and not in Mississippi, because the injury was received in Tennessee.

[1] Alabama &c. R. Co. v. Carroll, 60 Fed. 549; 84 Fed. 772; 28 C. C. A. 207 (1898).

[2] 113 Ala. 402; 21 So. 938 (1897).

the injury was received, unless this may be implied from the statement of the court (p. 405) that the wrongful act was committed in Tennessee. It was held, that in the absence of proof to the contrary, there was a presumption that the common law prevailed in Tennessee; that the Alabama statute could not overleap the state's boundaries and convert into an actionable wrong, conduct which was not actionable where it occurred.

The true view seems to be to regard negligence of this character as continuing negligence, having situs in either state or in both states, and giving a cause of action if the statute of either state so provides. In actions at common law based upon acts committed in one state causing damage to the plaintiff in another state, it is well settled that the plaintiff may recover in the former state if the law of that state permits, without regard to whether or not he could recover in the latter state.[1]

In Cincinnati &c. R. Co. v. McMullen (Ind.)[2] a conductor, who also performed the work of a brakeman in the defendant's employ, was killed in Ohio by the breaking of a defective brake in that state. The car with this brake was put into the train at Richmond, Ind. The defense was that the accident was occasioned by the negligence of the car-inspector at Richmond, if any one, and that the car-inspector and the plaintiff's intestate were coemployees, and their common employer was not liable to either for the other's negligence. The action was brought under the Ohio statute giving a right of action for the benefit of the wife and children of a person killed by the wrongful act, neglect or default of another. There was

[1] Mannville Co. v. Worcester, 138 Mass. 89 (1884); Mulhall v. Fallon, 176 Mass. 266, 267; 57 N. E. 386 (1900); State v. Lord, 16 N. H. 357 (1844); Wooster v. Great Falls Mfg. Co., 39 Me. 246 (1855); Armendiaz v. Stillman, 54 Tex. 623 (1881).

[2] 117 Ind. 439; 20 N. E. 287 (1888).

no evidence that the law of Ohio exempted the employer from liability for such negligence, and it was held that the Indiana court could not take judicial notice of the law of Ohio, and that as such law was neither pleaded nor proved, the law of Indiana controlled upon this point, and the plaintiff was entitled to judgment, because the duty of furnishing safe appliances was personal to the employer and could not be delegated to a fellow servant, under the law of Indiana. The law of the state where the negligent act was committed (Indiana) was, therefore, held to control, in the absence of evidence as to the law of Ohio, the place of the injury, to the contrary.

The theory that there is any difference in this matter between a right given by the common law and a right given by statute was exploded by the supreme court of the United States in the leading case of Dennick v. Railroad Co.,[1] decided in 1881.

The employees of railroads engaged in interstate business are peculiarly liable to injuries of this character. Under the power to regulate interstate and foreign commerce, it seems that congress may provide a remedy in such case. In Lord v. Steamship Co.[2] it was held that an act of congress,[3] restricting the common-law liability of common carriers engaged in such commerce for the negligence of their servants, was valid and constitutional under the commercial clause. By parity of reasoning, it follows that an act of congress enlarging the common-law liability of such common carriers for negligence is also constitutional.

§ 257. Injuries received on navigable waters.—The general admiralty and maritime jurisdiction of the United States extends wherever public navigation extends. This

[1] 103 U. S. 11; 1 Am. & Eng. R. Cas. 309.
[2] 102 U. S. 541.
[3] Rev. St. U. S., § 4283.

includes not only the sea, but also the great inland lakes and all other navigable waters within the United States.[1]

When an injury results in death, the rule in admiralty is the same as that of the common law, and, in the absence of an act of congress or of a state statute, no suit in admiralty can be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, caused by negligence.[2]

In Mahler v. Norwich &c. Co. (N. Y.)[3] the plaintiff's intestate was killed in Long Island Sound. It was held that the sound was within the territorial limits of the state of New York, and that an action could be maintained under the New York statute. A state statute applying to death by wrongful act on navigable waters within the territorial limits of the state does not encroach upon the commercial power of congress, and is not void as an interference with interstate commerce merely because the defendant's boat, upon which the wrongful act was committed, was engaged in interstate commerce at the time of the accident.[4]

Where the injury causing the death of the plaintiff's intestate occurred in Lake Michigan, more than three miles from Wisconsin but not beyond the middle of the lake, it was held that an action could be maintained in the federal courts under the statute of Wisconsin.[5]

A vessel on the high seas is for this purpose considered a part of the territory of the state in which she is regis-

[1] Waring v. Clarke, 5 How. 441; Genessee Chief v. Fitzhugh, 12 How. 443; Butler v. Boston Steamship Co., 130 U. S. 527, 557; 9 S. Ct. 612; In re Garnett, 141 U. S. 1; 11 S. Ct. 840.

[2] The Harrisburg, 119 U. S. 199; 7 S. Ct. 140.

[3] 35 N. Y. 352.

[4] Sherlock v. Alling, 93 U. S. 99.

[5] Bigelow v. Nickerson, 70 Fed. 113; 17 C. C. A. 1; 30 L. R. A. 336 (1895).

tered and from which she hails. As she is not within the jurisdiction of any foreign nation, and as the matter of a right of action for personal injury has not been vested in and exercised by the United States, she is regarded as within the jurisdiction of the state, and the right of action is governed by the laws of that state. It was accordingly held in McDonald v. Mallory (N. Y.)[1] that, under the New York statutes giving a right of action for causing the death of a human being by wrongful act or neglect, an action could be maintained for the death of a citizen of New York on the high seas on board a vessel whose home port was in that state.[2] The contrary was decided by Judge Sawyer, in Armstrong v. Beadle.[3]

A personal injury received on navigable waters is, however, subject to the terms of the Shipowners' Limited Liability Act of 1851.[4] This act of congress applies not only to injuries received on the high seas, but also to personal injuries received within the technical limits of a county in a state, even when the right of action is given by a statute of that state.[5] The states can not change or neutralize the operation of the maritime law in maritime cases. This act of 1851 provides in substance that when the injury occurs without the neglect, privity, or knowledge of the shipowner, his liability shall in no case exceed the value of his interest in the vessel and her freight then pending. Insurance money is no part of his interest in the vessel or freight within the meaning of this statute, and therefore the shipowner may hold this money

[1] 77 N. Y. 546; 33 Am. R. 664.

[2] That a ship at sea is considered part of the territory of the state or nation to which she belongs, see Crapo v. Kelly, 16 Wall. 610; The E. B. Ward, 17 Fed. 456; In re Moncan, 14 Fed. 44.

[3] 5 Sawyer 484.

[4] Rev. Stat. U. S., §§ 4282–4285.

[5] Butler v. Boston Steamship Co., 130 U. S. 527; 9 S. Ct. 612; The Albert Dumois, 177 U. S. 240; 20 S. Ct. 595.

free from the claims of persons who have suffered injury or loss on navigable waters.[1]

The act of congress of June 26, 1884,[2] reduces the individual liability of a shipowner for all debts and liabilities of the ship to the proportion of his individual share in the vessel. Section 4 of the act of June 19, 1886,[3] provides that the ship-owners' limited liability "shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters." This section has been held to be constitutional as applied to an enrolled and licensed steamboat exclusively engaged in commerce on a navigable river above tide-water.[4]

§ 258. Limit and measure of damages recoverable.— There is a difference of opinion upon the first question. Northern Pac. R. Co. v. Babcock[5] was an action brought by an administrator to recover damages for the death of a locomotive-engineer while in the employ of the railroad company, in an accident caused by a defective snow-plow. The injury was received in Montana territory, and the action was brought in the United States circuit court for the district of Minnesota. The Montana statute provided that "such damages may be given as under all the circumstances of the case may be just," and the Minnesota statute in force when the injury occurred limited the amount recoverable in case of death to $5,000, though before the trial it was increased to $10,000. The plaintiff obtained a verdict for $10,000 under a ruling that the case was governed by the law of Montana. The supreme court held that this ruling was right, and affirmed the judgment.

[1] The City of Norwich, 118 U. S. 468; 6 S. Ct. 1150; Butler v. Boston Steamship Co., 130 U. S. 527; 9 S. Ct. 612.
[2] 23 U. S. St. at Large 57.
[3] 24 U. S. St. at Large 79.
[4] In re Garnett, 141 U. S. 1; 11 S. Ct. 840.
[5] 154 U. S. 190; 14 S. Ct. 978.

In New York, however, it has been held that the extent of damages recoverable is governed by the lex fori, at least in the case of a New York corporation defendant, for the reason that the restriction indicates the public policy of the state, and a plaintiff who chooses to avail himself of their remedial procedure must submit to their remedial limitations and be content with a judgment for an amount within the power of the New York courts to grant. It was accordingly decided that the plaintiff's recovery could not exceed $5,000, the amount allowed by the New York statute, although by the statute of Pennsylvania, where the injury occurred, no restriction was placed upon the amount of damages.[1]

A distinction has been taken upon this question between the cases of a right of action existing at common law and a right of action given by statute which does not exist at common law. When the right of action existed at common law in New York, where the contract of carriage was made, and the plaintiff's injury occurred in Pennsylvania, where there was a statute limiting the amount recoverable for personal injuries received on railroads to $3,000, it was held by the New York courts that the Pennsylvania statute would not be recognized or enforced upon this point.[2]

Where, on the other hand, an action was brought in Kentucky for an injury received in Alabama, and the right of action was created by the Employers' Liability Act of Alabama and did not exist at common law, it was decided by the supreme court of Kentucky that the measure of damages was governed by the law of Alabama.[3]

[1] Wooden v. Western New York &c. R. Co., 126 N. Y. 10; 26 N. E. 1050; 22 Am. St. 803; 13 L. R. A. 458.

[2] Dyke v. Erie R. Co., 45 N. Y. 113; Lyons v. Erie R. Co., 57 N. Y. 489, 490.

[3] Louisville &c. R. Co. v. Graham, 98 Ky. 688; 17 Ky. L. 1229; 34 S. W. 229.

In Atwood v. Walker (Mass.)[1] a contract was made in New York, by which the defendant agreed to convey to the plaintiff a parcel of land situated in Massachusetts. The defendant was unable to give a good title, but was not aware of the defect in the title when she made the contract. By the law of Massachusetts, the plaintiff could recover his loss of profit arising from the breach of contract;[2] but by the law of New York, the plaintiff could recover only nominal damages and expenses without profit. It was held that the measure of damages was controlled by the law of New York, where the contract was made and was to be performed by the delivery of the deed and the payment of the purchase-money.

Upon the second question the rule seems to be that the damages recovered under a statute of another state for personal injuries should be distributed according to the laws of such other state, even if the laws of the state in which the question arises provide for their distribution to other persons.[3]

If a married woman is injured in a state which allows her to carry on business in her own name and for her own benefit without being subject to the claims of her husband's creditors, and if she brings suit in that state in her own name, the fact that her husband lives in another state where married women do not possess these property-rights does not prevent the wife recovering damages for impairment of her earning capacity and for the shortening of her expectation of life in that connection. In Texas &c. R. Co. v. Humble,[4] a wife living in Arkansas who had been until recently engaged in busi-

[1] 179 Mass. 514; 61 N. E. 58 (1901).

[2] Roche v. Smith, 176 Mass. 595, 598; 58 N. E. 152.

[3] McDonald v. McDonald, 96 Ky. 209; 16 Ky. L. 412; 28 S. W. 482; 49 Am. St. 289; Dennick v. Railroad Co., 103 U. S. 11; 1 Am. & Eng. R. Cas. 309.

[4] 181 U. S. 57; 21 S. Ct. 526.

ness on her own account as permitted by the statutes of that state, was injured by the negligence of the railroad company in the state of Arkansas and brought this action in her own name to recover damages therefor. It appeared that the plaintiff's husband resided in the state of Louisiana, under whose laws a married woman had no right to maintain such an action in her own name, and it was contended by the defendant that the wife could not recover for impairment of her earning capacity, and that the husband was the only proper party to maintain such an action. It was held, however, by the supreme court of the United States, that the question was governed by the law of Arkansas because that was both the place of the injury and the place of action, and not by the law of Louisiana; and it was strongly intimated that if the husband should bring an action in Louisiana a judgment in this action would be a bar to a recovery for anything relating to the wife's right to recover for impairment to her earning capacity. "Granting that the statutes of Arkansas," says Chief Justice Fuller, in delivering the opinion of the court, on page 63, "have not deprived the husband of the services of the wife in the household in the care of the family, or in and about his business, yet they have bestowed on her independent of him her earnings on her own account, and given her authority to acquire them. They proceed upon the difference between the discharge of marital duties and independent labor. As the results of her earning capacity when exerted for herself belonged to her, the deprivation of that capacity was to that extent her individual loss. The husband may recover for loss of services belonging to him but not for loss of the wife's potentiality to earn for herself nor for her expectation of life in that connection; and if he can not, she can."[1]

[1] Citing Harmon v. Old Colony R. Co., 165 Mass. 100; 42 N. E. 505; 2 Am. St. 499; 30 L. R. A. 658.

§ 259. Procedure governed by lex fori.—In an action for personal injury received in a state other than that of suit, all matters of procedure are governed by the law of the forum. The burden of proof is a matter of procedure within this rule, and therefore the practice of such other state has no application. In the Alabama case of Helton v. Alabama &c. R. Co.[1] the injury was received in Georgia, in which state proof that the plaintiff has been injured by the defendant is proof of defendant's negligence unless the defendant overcomes it with counter proof. In Alabama the rule is the contrary, and in the case cited it was accordingly held that the Alabama rule applied and governed the case.

The question whether vindictive or exemplary damages are recoverable is also a question of procedure. Hence, when a personal injury was received in Connecticut, where such damages are recoverable,[2] and suit was brought in Massachusetts, where they are not recoverable, it was held that the plaintiff could not recover such damages in Massachusetts, because the lex fori controlled.[3] In the same Massachusetts case it appeared that the practice in Connecticut was to have the damages assessed by the judge alone, and the plaintiff had no right to have them assessed by a jury when the defendant submitted to a default.[4] In Massachusetts the plaintiff had the right to demand an assessment of damages by a jury in such case, and it was held that the Massachusetts practice governed.

So also all questions relating to amendments and plead-

[1] 97 Ala. 275; 12 So. 276. See also, Smith v. Wabash R. Co., 141 Ind. 92, 105; 40 N. E. 270 (1895).

[2] Noyes v. Ward, 19 Conn. 250; Murphy v. New York &c. R. Co., 29 Conn. 496, 499.

[3] Higgins v. Central New England R. Co., 155 Mass. 176, 181; 29 N. E. 534; 31 Am. St. 544.

[4] Gen. Stats. of Conn. of 1888, § 1106; Raymond v. Danbury &c. R. Co., 43 Conn. 596, 598.

ing are matters of procedure within the meaning of this rule, and the practice of the state of process controls the practice of the state of injury.[1]

In Massachusetts it has been held that, where an injury resulting in death occurs in one state and suit is brought in another state, the question as to the person entitled to sue therefor is governed by the lex fori. "A succession in the right of action, not existing by the common law, can not be prescribed by the laws of one state to the tribunals of another. It is upon this principle that the negotiability of contracts, and whether an assignee can maintain an action in his own name, is held to be determined by the lex fori, and not by the lex loci contractus—a matter, not of right, but of remedy."[2]

In Pennsylvania and New York and Georgia, however, the contrary has been decided.[3] In Usher v. West Jersey R. Co. (Pa.)[4] a widow brought an action in Pennsylvania for the negligent killing of her husband in New Jersey. The New Jersey statute gave the right of action to the personal representative for the exclusive benefit of the widow and next of kin. A like statute of Pennsylvania gave the right of action to the widow, etc. It was held that the question as to who was entitled to sue was not a mere matter of remedy or procedure governed by the lex fori, but that the remedy was so inseparably attached to the right that the remedy must also be governed by the statute of the state giving this

[1] South Carolina R. Co. v. Nix, 68 Ga. 572.

[2] Per Hoar, J., for the court, in Richardson v. New York Cent. R. Co., 98 Mass. 85, 92.

[3] Usher v. West Jersey R. Co., 126 Pa. St. 206; 17 Atl. 597; 12 Am. St. 863; 4 L. R. A. 261; Wooden v. Western New York &c. R. Co., 126 N. Y. 10; 26 N. E. 1050; 22 Am. St. 803; 13 L. R. A. 458; Selma &c. R. Co. v. Lacy, 49 Ga. 106. See also, Boston &c. R. Co. v. McDuffey, 79 Fed. 934; 25 C. C. A. 247.

[4] 126 Pa. St. 206; 17 Atl. 597; 12 Am. St. 863; 4 L. R. A. 261.

right, and in which the injury was inflicted. It was accordingly decided that the plaintiff could not recover as the widow of the deceased.

In Wooden v. Western New York &c. R. Co. (N. Y.)[1] the plaintiff's husband was killed in Pennsylvania through the defendant's negligence. The Pennsylvania statute giving the right of action required suit to be brought by the widow, while the like statute of New York required the action to be brought by the executor or administrator of the deceased. It was held that the lex loci controlled, and that the action was properly brought by the widow as such, and not as administratrix. Mr. Justice Finch, in delivering the court's opinion, says on page 16: "But it must not be forgotten that the cause of action sued upon is the cause of action given by the lex loci, and vindicated here and in our tribunals upon principles of comity. That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. * * * It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity, and therefore must be prosecuted here in the name of the party to whom alone belongs the right of action."

In a Kansas case it has been held that an administrator appointed in Missouri could not maintain an action in Kansas for the negligent killing of the deceased in Kansas, because the Missouri statute giving a right of action in such case provided that the action should be brought by the husband or wife of the deceased, although the Kansas statute declared that the action should be brought in the name of the personal representative for the benefit of the widow and children. The decision was placed on the

[1] 126 N. Y. 10; 26 N. E. 1015; 22 Am. St. 803; 13 L. R. A. 458.

ground that, as the administrator derived all his powers from the appointing state, he could not do an act in Kansas which he had not the power to perform in Missouri.[1]

In Iowa it has been held that the rule of comparative negligence which prevailed where the accident happened (Ohio), affected the remedy merely, and that the action was governed by the law of Iowa upon this point, and that contributory negligence, according to the law of Iowa, was a defense.[2] But the contrary has been decided in Tennessee, holding that as contributory negligence was a defense in the state of injury (Georgia), it would also constitute a defense in Tennessee, as this was a matter which affected the merits of the controversy, and not merely the remedy.[3]

§ 260. When law of place of injury controls.—The place of an injury to the person by negligence may be considered the situs of the cause of action, and the law of this place often has a controlling effect upon the decision of a court in another state. Even the legal effect of a contract between the parties made in one state may be regulated or invalidated by the law of another state in which the personal injury occurs by reason of the defendant's negligence.

In Louisville &c. R. Co. v. Whitlow (Ky.)[4] the plaintiff's decedent was killed in Tennessee by defendant's negligence, Kentucky and Tennessee having somewhat similar statutes, giving an action for death by wrongful act.

[1] Limekiller v. Hannibal &c. R. Co., 33 Kan. 83; 5 Pac. 401.

[2] Johnson v. Chicago &c. R. Co., 91 Iowa 248; 59 N. W. 66 (1894).

[3] Railway Co. v. Lewis, 89 Tenn. 235; 14 S. W. 603 (1890). See also, Louisville &c. R. Co. v. Whitlow, 19 Ky. L. 1931; 43 S. W. 711; 41 L. R. A. 614 (1897).

[4] 19 Ky. L. 1931; 43 S. W. 711; 41 L. R. A. 614.

In Tennessee, however, contributory negligence is not considered a bar to the action, but merely in mitigation of damages, while in Kentucky contributory negligence is a bar. It was held in this action in Kentucky that the law of Tennessee upon this point should control, because contributory negligence relates to the right and not merely to the remedy. [1]

In Burnett v. Pennsylvania R. Co. (Pa.)[2] the plaintiff applied for and received in New Jersey a free pass from Philadelphia, Pa., to Elmira, N. Y., by the terms of which pass he assumed all risk of accident. The plaintiff was in the defendant's employ, and such exemption was valid in New Jersey, but void in Pennsylvania. He was injured in Pennsylvania, through the negligence of defendant's employees, while riding on this pass. The court held that the contract was governed by the law of Pennsylvania, because that was the place of performance; that the exemption was therefore void, and the plaintiff entitled to recover.

If the defendant's breach of duty sounds in contract and not in tort, it has been held in some states that the law of the state of contract generally controls; but that if the defendant's breach of duty sounds in tort, rather than in contract, the law of the state of injury governs the substantial rights and liabilities of the parties.[3]

Where, however, the state of action has expressly declared by statute that its citizens shall be entitled to recover under its Employers' Liability Act for an injury

[1] Contra, as to comparative negligence, Johnson v. Chicago &c. R. Co., 91 Iowa 248; 55 N. W. 66.

[2] 176 Pa. St. 45; 34 Atl. 972 (1896).

[3] Knowlton v. Erie R. Co., 19 Ohio St. 260; 2 Am. R. 395 (free passenger); Alexander v. Pennsylvania Co., 48 Ohio St. 623, 635; 30 N. E. 69 (employee); Alabama &c. R. Co. v. Carroll, 97 Ala. 126, 136; 11 So. 803; 38 Am. St. 163; 18 L. R. A. 433 (employee); Herrick v. Minneapolis &c. R. Co., 31 Minn. 11; 16 N. W. 413; 47 Am. R. 771 (1883); Belt v. Gulf &c. R. Co., 4 Tex. Civ. App. 231; 22 S. W. 1062 (1893).

suffered in another state, under whose laws no recovery could be had, the courts of the former state are controlled by such statute, and a recovery may be obtained by the plaintiff. Such a statute seems to be constitutional, at least with respect to employers of the state of the act.[1] Whether or not the courts of other states will give effect to such a statute is doubtful.[2]

[1] Pittsburg &c. R. Co. v. Hosea, 152 Ind. 412; 53 N. E. 419; Williams v. Southern R. Co., 128 N. C. 286; 38 S. E. 893; ante, § 29. Contra, Baltimore &c. R. Co. v. Reed, 158 Ind. 25; 62 N. E. 488.

[2] Whitford v. Panama R. Co., 23 N. Y. 465, 471.

CHAPTER XVII.

EVIDENCE.

SECTION

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§ 261. Fellow servant's reputation for incompetency.—Evidence of a general reputation for incompetency of a fellow servant whose negligence causes the plaintiff's injury is admissible in an action against the common em-

ployer.[1] But his reputation among a few workmen is not competent.[2] In Driscoll v. City of Fall River, just cited, Mr. Justice Morton for the court says: "A general reputation regarding the incompetency of a servant is admissible on the ground that it furnishes some reason to believe that, if the master had exercised due care, he might have learned or heard of the incompetency. But the reputation of a foreman amongst a few workmen employed under him is not a general reputation. It is merely the opinion of a small number of men, of which there is no sufficient reason to suppose the master may be cognizant, or which he may be bound to heed."

When the action is for the negligent act of a competent superintendent under the statute, evidence of the general reputation of the superintendent as a careful workman is inadmissible.[3]

§ 262. Employer's subsequent acts.—At common law, the rule is well settled in most states, though the contrary rule prevails in Pennsylvania and Kansas, that in an action for the employer's negligence, his subsequent acts in taking additional precautions to prevent similar injuries from occurring in the future are not admissible in evidence against him. Such acts do not amount to an admission of negligence on his part.[4] Nor can the dis-

[1] Monahan v. City of Worcester, 150 Mass. 439; 23 N. E. 228; 15 Am. St. 226; Gilman v. Eastern R. Co., 13 Allen (Mass.) 433, 444; 90 Am. D. 210.

[2] Driscoll v. City of Fall River, 163 Mass. 105; 39 N. E. 1003.

[3] Malcolm v. Fuller, 152 Mass. 160; 25 N. E. 83.

[4] Columbia R. Co. v. Hawthorne, 144 U. S. 202; 12 S. Ct. 591; Menard v. Boston &c. R. Co., 150 Mass. 386; 23 N. E. 214; Downey v. Sawyer, 157 Mass. 418; 32 N. E. 654; Corcoran v. Village of Peekskill, 108 N. Y. 151; 15 N. E. 309; Nalley v. Hartford Carpet Co., 51 Conn. 524; 50 Am. R. 47; Terre Haute &c. R. Co. v. Clem, 123 Ind. 15; 23 N. E. 965; 18 Am. St. 303; 7 L. R. A. 588; Hodges v. Percival, 132 Ill. 53; 23 N.

charge of the negligent employee after the accident be shown.[1]

The same rule has been applied to an action under the Massachusetts Employers' Liability Act for the death of an employee, although the third section provides that the amount of compensation in case of death is to be assessed "with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable." In delivering the court's opinion, Mr. Justice Lathrop says: "But, if evidence is not admissible to show culpability, we fail to see how it can be admissible to show the degree of culpability."[2]

Evidence of repairs made after an injury to an employee is not admissible to show negligence on the part of the defendant.[3]

§ 263. Previous specific acts of negligence.—Where the issue in an action for personal injuries relates to the negligent act of a competent person, and no incompetency is charged in the declaration, evidence is not admissible to show that the person in question had previously committed certain negligent acts or that he had performed certain careful acts. "If such evidence were to be received, it might be necessary to investigate the conduct of the actor in every act of his life, and to draw inferences from acts similar and dissimilar, showing every degree of care

E. 423; Ely v. St. Louis &c. R. Co., 77 Mo. 34; Hudson v. Chicago &c. R. Co., 59 Iowa 581; 13 N. W. 735; 44 Am. R. 692; Morse v. Minneapolis &c. R. Co., 30 Minn. 465; 16 N. W. 358; Hart v. Lancashire &c. R. Co., 21 L. T. (N. S.) 261. Contra, McKee v. Bidwell, 74 Pa. St. 218; St. Louis &c. R. Co. v. Weaver, 35 Kan. 412; 11 Pac. 408; 57 Am. R. 176.

[1] Hewitt v. Taunton St. R. Co. 167 Mass. 483; 46 N. E. 106.

[2] Shinners v. Proprietors &c., 154 Mass. 168, 171; 28 N. E. 10; 26 Am. St. 226; 12 L. R. A. 554.

[3] Chicago &c. R. Co. v. Lee, 17 Ind. App. 215; 46 N. E. 543 (1897).

or negligence. * * * To do this would introduce a multiplicity of issues of which the parties ordinarily could not have previous notice, and which it would be impracticable properly to try."[1]

For the same reasons it is held in Massachusetts and in other states, though there are some decisions to the contrary, that a person's reputation or character for care or negligence can not be shown by evidence of particular acts.[2]

Where, however, the action is brought to recover for the negligent act of an incompetent employee and it is sought to hold the defendant liable upon the ground of employing an incompetent servant, the rule generally adopted is that the specific acts of negligence of such person shortly before the accident may be proved to show incompetency, but not to show that his employer was negligent in hiring him or retaining him in his service, and that other evidence is required to show that the employer knew or ought to have discovered his incompetency.[3] In New York this rule has been clearly stated by Mr. Justice Allen, in Baulic v. New York &c. R. Co.,[4] in the following language: "When, as here, the general fitness and capacity of a servant is involved, the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of

[1] Connors v. Morton, 160 Mass. 333, 334, 335; 35 N. E. 860, per Knowlton, J.; Maguire v. Middlesex R. Co., 115 Mass. 239.

[2] Hatt v. Nay, 144 Mass. 186; 10 N. E. 807; Frazier v. Pennsylvania R. Co., 38 Pa. St. 104. Contra, Baulic v. New York &c. R. Co., 59 N. Y. 356; 17 Am. R. 325; Pittsburgh &c. R. Co. v. Ruby, 38 Ind. 294; 10 Am. R. 111.

[3] Olsen v. Andrews, 168 Mass. 261, 265; 47 N. E. 90; Peaslee v. Fitchburg R. Co., 152 Mass. 155; 25 N. E. 71; Keith v. New Haven &c. Co., 140 Mass. 175; 3 N. E. 28.

[4] 59 N. Y. 356, 360; 17 Am. R. 325.

misconduct or neglect of servants or employees whose acts and omissions of duty are the subject of investigation have been held incompetent, have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion, by showing similar acts of negligence on other occasions. This class of cases does not bear upon the case in hand, and may be laid out of view. Proof of specific acts of negligence of a servant or agent on one or more occasions does not tend to prove negligence on the particular occasion, which is the subject of inquiry.[1] Where character as distinguished from reputation is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation, or want of adaptation, to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described and the actual qualities, the true characteristics of individuals, those qualities and characteristics which would and should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent or careless man. He would be held liable to the fellow servants of the employee for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of spe-

[1] Citing Evansville &c. R. Co. v. Guyton, 115 Ind. 450; 17 N. E. 101; Baltimore Elevator Co. v. Neal, 65 Md. 438; 5 Atl. 338; Couch v. Watson Coal Co., 46 Iowa 17; Huffman v. Railroad Co., 78 Mo. 50.

cific acts showing that he possessed characteristics incompatible with the duties assigned to him and which might expose his fellow servants and others to peril and harm."

§ 264. Evidence of customary negligence.—In an action by a brakeman against a railroad company under the Massachusetts statute, evidence that it is customary for brakemen to jump from moving freight-trains without looking to see where they would alight, and that this was done with the knowledge and approval of the defendant's superintendent, is not admissible.[1] But evidence that it is customary to inspect freight-trains in motion is admissible, for the purpose of showing that a car-inspector, who is injured while inspecting a moving freight-train, is in the exercise of due care and diligence.[2]

In an action under the Massachusetts act it was held that evidence that the plaintiff had boasted of his ability to keep out of the way of railroad-trains was admissible against him in a suit against the railroad company for personal injuries occasioned by being run over by a train, as bearing upon the question of his carefulness or readiness to take risks.[3]

A custom to break the law can not be shown in defense of an action for negligence. Evidence that it is not customary among employers in the defendant's business to use a fusible safety-plug on steam-boilers such as the defendant used at the time of the injury to his employee, although a statute declared that a plug should be used on boilers, is incompetent.[4]

[1] Thompson v. Boston &c. R. Co., 153 Mass. 391; 26 N. E. 1070. A like rule prevails in Alabama at common law: Warden v. Louisville &c. R. Co., 94 Ala. 277; 10 So. 276; 14 L. R. A. 552.

[2] Steffe v. Old Colony R. Co., 156 Mass. 262; 30 N. E. 1137.

[3] Brouillette v. Connecticut River R. Co., 162 Mass. 198; 38 N. E. 507.

[4] Cayzer v. Taylor, 10 Gray (Mass.) 274; 69 Am. R. 317.

§ 265. Evidence of superintendence.—Evidence of a habit or custom not to inspect railroad-cars on their arrival at a certain place is competent to show that an injury caused by a brake-wheel and nut coming off while the brakeman was performing his duty was due to improper superintendence, for which the employer would be liable.[1] But a mere failure to inspect on a single occasion would be evidence only of the negligence of a fellow servant, for which the employer would not be liable at common law.[2]

In an action under the Alabama act for a defect in the brake of a railroad-car, it was held that the burden was on the plaintiff, a brakeman, to prove that the defect existed when the train was made up, or at a station where it could have been inspected, and that the defect was either known to the car-inspector there or might have been discovered by him by the exercise of due diligence, and that such defect was the proximate cause of the injury.[3]

§ 266. Burden of proving defendant's negligence.—At common law the burden of proving that the defendant's negligence caused the plaintiff's injury is upon the plaintiff.[4]

A like rule prevails under the Employers' Liability Act.[5] Where the injury was caused by the slipping of a flight of movable stairs belonging to a third person, it was held that proof of mere knowledge on the defendant's part that the stairs were movable, without any evidence to show that movable stairs were unsafe in themselves or unsuitable for the place, or that the defendants knew or

[1] Coffee v. New York &c. R. Co., 155 Mass. 21; 28 N. E. 1128.
[2] Mackin v. Boston &c. R. Co., 135 Mass. 201; 46 Am. R. 456.
[3] Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619.
[4] Louisville &c. R. Co. v. Allen, 78 Ala. 494.
[5] Regan v. Donovan, 159 Mass. 1, 3; 33 N. E. 702; Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619.

had reason to suppose that the owner would leave them insecurely placed, is not sufficient to sustain this burden of proof.[1]

So, when the action is for an injury caused by a defect in the condition of the ways, etc., the burden is upon the plaintiff to show that the defect arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in his employ and entrusted with the duty of seeing that the ways, etc., were in proper condition.[2]

§ 267. Burden of proving due care of employee.—In Massachusetts and in some other states the burden is upon the plaintiff to prove that he was in the exercise of due care at the time of the injury. This rule applies to actions under the Employers' Liability Act, as well as to actions at common law. If the evidence is as consistent with carelessness as with due care, the action can not be maintained.[3]

When the act alleged to be negligent points as clearly to the negligence of a fellow servant as to that of the defendant himself or of one of his servants for whose negligence he is liable under the statute, the plaintiff can not recover.[4]

[1] Regan v. Donovan, 159 Mass. 1; 33 N. E. 702.

[2] Louisville &c. R. Co. v. Campbell, 97 Ala. 147, 151; 12 So. 574.

[3] Shea v. Boston &c. R. Co., 154 Mass. 31; 27 N. E. 672; Browne v. New York &c. R. Co., 158 Mass. 247; 33 N. E. 650; Irwin v. Alley, 158 Mass. 249; 33 N. E. 517; Murphy v. Deane, 101 Mass. 455; 3 Am. R. 390; Chandler v. New York &c. R. Co., 159 Mass. 589; 35 N. E. 89. In the above cases it was held that the plaintiff had failed to sustain this burden of proof and could not recover. In the following cases it was held that he had sustained the burden of proof: Maher v. Boston &c. R. Co., 158 Mass. 36; 32 N. E. 950; Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425; Maguire v. Fitchburg R. Co., 146 Mass. 379; 15 N. E. 904.

[4] Thyng v. Fitchburg R. Co., 156 Mass. 13; 30 N. E. 169; 32 Am. St. 425. The rule is otherwise when the person injured is not an employee of the defendant; for in this case the defendant is liable for the negligence of any of its servants, and the rule of fellow servants does not apply.

Where all the circumstances attending the injury are in evidence, the mere absence of evidence of fault on the part of the injured employee may justify the inference of due care.[1] But where there is an entire absence of evidence as to what he was doing at the time of the injury, the inference of due care does not arise, and the plaintiff fails to sustain the burden of proof.[2]

When there is no direct evidence as to how the injury occurred, or as to whether the injured employee was in the exercise of due care, and these questions can be answered only by conjecture, an action under the Massachusetts act can not be sustained in the state courts.[3]

If an employee be injured by a trap in the employer's premises or appliances, he need not prove due care on his own part, or negligence on the part of the defendant, but merely the wrongful deceit of the defendant in putting the plaintiff at work in a place which was well known to the defendant to be dangerous, and which danger was unknown to the plaintiff and was not obvious.[4]

§ 268. Same—Contrary rule in Alabama and elsewhere.—In Alabama, however, the burden is not upon the plaintiff to prove that he was in the exercise of due care at the time of his injury. Want of due care on his part is a matter of defense, and must be alleged and proved by the defendant in actions under the Employers' Liability Act as well as at common law.[5] A like rule prevails in Colorado at common law,[6] and probably also under the Employers' Liability Act of 1893.

[1] Maher v. Boston &c. R. Co., 158 Mass. 36; 32 N. E. 950.
[2] Tyndale v. Old Colony R. Co., 156 Mass. 503; 31 N. E. 655.
[3] Irwin v. Alley, 158 Mass. 249; 33 N. E. 517.
[4] Kilberg v. Berry, 166 Mass. 488, 490, 491; 44 N. E. 603.
[5] Mary Lee Coal Co. v. Chambliss, 97 Ala. 171; 11 So. 897; Bromley v. Birmingham R. Co., 95 Ala. 397; 11 So. 341.
[6] Moffatt v. Tenney, 17 Colo. 189; 30 Pac. 348; Kansas Pac. R. Co. v. Twombly, 3 Colo. 125.

In the federal courts, also, the rule is contrary to the Massachusetts rule. The well-settled law of the federal courts is that "contributory negligence on the part of the plaintiff need not be negatived or disproved by him, but the burden of proving it is upon the defendant."[1] This seems to be the better rule, as such negligence is more properly a matter of defense than the want of it is a ground of action. Especially is this true when an employee is killed when no one is near him. In such case, if the Massachusetts rule were strictly enforced, a verdict for the plaintiff would be impossible. The rule has been somewhat relaxed, however, so as to allow a recovery where all the circumstances attending the injury are in evidence, and they fail to show any fault on the part of the injured person, upon the ground that an inference of due care is justified under these facts.[2] But where there is no direct evidence as to what he was doing, or as to how the injury occurred, no inference of due care is justified, and the plaintiff can not recover in the state courts of Massachusetts.[3] In the federal courts, however, sitting even in Massachusetts, a recovery is not barred in this last case.[4]

§ 269. Burden of proving plaintiff's infancy.—Where the plaintiff relies upon his infancy to avoid a settlement for personal injuries received while in the defendant's employ, the burden of proving infancy at the time of such settlement is upon him; and the testimony of his brother

[1] Railroad Co. v. Gladmon, 15 Wall. 401; Indianapolis Co. v. Horst, 93 U. S. 291; Northern Pac. R. Co. v. Mares, 123 U. S. 710; 8 S. Ct. 321; Texas &c. R. Co. v. Volk, 151 U. S. 73, 77; 14 S. Ct. 239.

[2] Maher v. Boston &c. R Co., 158 Mass. 36; 32 N. E. 950.

[3] Tyndale v. Old Colony R. Co., 156 Mass. 503; 31 N. E. 655; Irwin v. Alley, 158 Mass. 249; 33 N. E. 517.

[4] Griffin v. Overman Wheel Co., 61 Fed. 568; 9 C. C. A. 542.

that the reputation in the family was that the plaintiff was under twenty-one years of age at that time is not admissible.[1]

§ 270. Plaintiff's belief that there was no danger.—On the issue as to whether the plaintiff was in the exercise of due care and diligence at the time of the injury, his belief that there was no danger, after an assurance to that effect from the defendant's superintendent under whom he was working, is admissible in evidence.[2]

§ 271. Attorney's authority to sign and serve notice presumed.—When notice of the time, place and cause of the injury is signed by an attorney at law on behalf of the injured employee, the notice is admissible in evidence, without proof that it was given by the plaintiff's direction, or that the attorney was in fact authorized to sign and serve it. In the absence of any proof to the contrary, it will be presumed that the attorney had such authority. "His declaration that he had authority, or his assumption of authority, is prima facie sufficient."[3]

§ 272. Confidential communication to attorney and to physician or surgeon.—Although a communication to one's attorney is privileged, yet, as this privilege is personal to the client, if the client be a party to a suit and insists upon this privilege to exclude testimony that would throw light upon the merits of the case or upon the truth of his own testimony, it has been held that such conduct is a proper subject of comment to the jury in a civil action.[4]

[1] Rogers v. De Bardeleben Coal Co., 97 Ala. 154; 12 So. 81.

[2] Malcolm v. Fuller, 152 Mass. 160; 25 N. E. 83.

[3] Steffe v. Old Colony R. Co., 156 Mass. 262, 264; 30 N. E. 1137. See also, Manchester Bank v. Fellows, 28 N. H. 302; Inhabitants &c. v. Bennett, 23 Me. 420; Proprietors &c. v. Bishop, 2 Vt. 231.

[4] Andrews v. Frye, 104 Mass. 234, 236. See also, Commonwealth v. Smith, 163 Mass. 411, 430; 40 N. E. 189.

In an action under the Massachusetts Employers' Liability Act, the defendant called the plaintiff's former attorney who sent the statutory notice of the accident and offered to show that the account which the plaintiff gave at that time was materially different from his testimony at the trial. Upon objection made by the plaintiff's counsel to such testimony concerning confidential communications of a client, the trial court required the plaintiff in person to elect whether to rely upon his privilege or not. It was held that this action of the court, requiring the plaintiff to state in person whether he objected to such a question or not, was proper, and within the power of the trial court.[1]

By statute in Colorado a physician or surgeon is prohibited from testifying as to any information which he has acquired while attending a patient, without the latter's consent.[2] The relation of physician and patient exists, within the meaning of the statute, between a physician employed in a hospital which is supported wholly or partly by deductions from the wages of defendant's employees, and an employee injured while in the defendant's service, although the defendant established the hospital and retained control of it.[3]

§ 273. Expert testimony—Strength of materials, etc.—A person who has made a special study of the strength of materials, and the proper mode of building structures to sustain weight, may state his opinion as to whether a staging erected in a specified way can safely bear a particular load. It was so held in an action under the Massachusetts Employers' Liability Act to recover for an injury re-

[1] McCooe v. Dighton &c. R. Co., 173 Mass. 117; 53 N. E. 133.

[2] Gen. Sts. Colo., § 3649.

[3] Colorado Fuel &c. Co. v. Cummings, 8 Colo. App. 541; 46 Pac. 875 (1896).

ceived by the fall of a staging upon which a load of wood had been placed.[1]

In O'Brien v. Look (Mass.)[2] the plaintiff while in the defendant's employ was injured by the fall into the hold of a vessel of a fore-and-after which the defendant's servants were attempting to place over the combings of the hatch. In this action under the Employers' Liability Act of Massachusetts it was held that an expert might answer a hypothetical question as to whether the method adopted of lowering the fore-and-after was safe and proper.

In an action under the Alabama act for a defect in the defendant's coal-way, it was held that an expert may testify that the general rule is to leave three feet between the wall of a coal-mine entry and a coal-car, and that a space of one foot and a half was unsafe.[3] The plaintiff had been crushed between the wall and his car while attempting to sprag the wheels on a down grade.

Men who have been "railroading" for fifteen years and are familiar with the duties of brakemen may testify as experts as to the proper position of brakemen on the cars, and as to the danger of riding on the edge of the car with the feet hanging over the side.[4]

A man who has operated trains on a railroad for eight years may state his opinion as to the effect of a car heavily loaded or empty running over an improperly-set switch.[5]

In an action under the Alabama statute to recover damages for an injury received while attempting to uncouple a car from a road-engine without a flat-car attached to the engine, a switchman, who has been "about the yard" for twenty years, may testify as an expert that

[1] Prendible v. Connecticut River Mfg. Co., 160 Mass. 131; 35 N. E. 675.
[2] 171 Mass. 36; 50 N. E. 458.
[3] McNamara v. Logan, 100 Ala. 187; 14 So. 175.
[4] Schlaff v. Louisville &c. R. Co., 100 Ala. 377; 14 So. 105.
[5] Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714.

it is more dangerous to uncouple a car from a road-engine which has no flat-car attached to it than if it had a flat-car attached to it, because the flat-car obviates the necessity of standing on the ground between the two while doing the uncoupling.[1]

A witness who testifies that he has had much experience in the use of a machine known as a "tipple," used in emptying refuse from coal-cars, and that he was well acquainted with its use, if not with its construction, may testify that the pattern of the tipple which killed the plaintiff's intestate was "reasonably adapted for the purpose for which it was used;" and, if he knew its condition at the time of the injury, he may state whether or not it was in good repair.[2]

In McGuerty v. Hale (Mass.)[3] a boy of eighteen years was injured by a machine while in the defendant's employ. The plaintiff asked a witness called as an expert the following question: "Should you consider that a boy eighteen years old, a short boy like the plaintiff here, was a proper person to put to work on such a machine as that before you?" It was held that the question was not one for an expert to answer, and that it was properly excluded.[4]

§ 274. Same—The question at issue—A matter of common knowledge, etc.—The general rule is that an expert witness can not testify upon the precise question at issue, especially if it is a matter of common knowledge, which

[1] Mobile &c. R. Co. v. George, 94 Ala. 199; 10 So. 145.

[2] Alabama Coal Co. v. Pitts, 98 Ala. 285; 13 So. 135.

[3] 161 Mass. 51; 36 N. E. 682.

[4] For other illustrations of expert testimony in actions for personal injuries to employees, see Connelly v. Hamilton Woolen Co., 163 Mass. 156; 39 N. E. 787; Lang v. Terry, 163 Mass. 138; 39 N. E. 802; Twomey v. Swift, 163 Mass. 273; 39 N. E. 1018; Ouillette v. Overman Wheel Co., 162 Mass. 305; 38 N. E. 511; Welch v. New York &c. R. Co., 176 Mass. 393; 57 N. E. 668.

requires no special training or experience to decide. The jury must decide such questions without the opinions of witnesses.[1]

In Bergen Co. Traction Co. v. Bliss (N. J.)[2] it was decided that the opinion of an expert that the kind of block signals used on a trolley-road are not reasonably safe for the employees operating the cars of the road, is incompetent in an action to recover damages for an injury to an employee caused by the use of unsafe and defective machinery, because that is the very question for the jury to determine.

Where the question at issue was what caused the baggage-car to leave the track at the time of the accident to the plaintiff, it was held that a machinist who was familiar with the running of cars and who was on the train at the time of the accident, could give an opinion upon this question, because it "so far involved the application of forces as to be properly within the range of testimony of experts."[3]

In Colorado the rule is well settled that a witness can not properly express an opinion upon the precise question of fact which is before the jury to decide as an ultimate fact in the case. To permit this would be to allow the witness to usurp the functions of the jury.[4]

[1] New England Glass Co. v. Lovell, 7 Cush. (Mass.) 319; Buxton v. Somerset Potters' Works, 121 Mass. 446; White v. Ballou, 8 Allen (Mass.) 408; Simmons v. New Bedford Steamboat Co., 97 Mass. 361; Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469; Inland &c. Co. v. Tolson, 139 U. S. 551; 11 S. Ct. 653; Decatur Car Wheel Mfg. Co. v. Mehaffey, 128 Ala. 100; 29 So. 646 (1901); Alabama &c. R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 62 Am. St. 121 (1896).

[2] 62 N. J. L. 410; 41 Atl. 837 (1898).

[3] Seaver v. Boston &c. R. Co., 14 Gray (Mass.) 466, 471. See also, Olmstead v. Gere, 100 Pa. St. 127; Gates v. Fleicher, 67 Wis. 504; 30 N. W. 674; Wright v. Hardy, 22 Wis. 348.

[4] Holy Cross Gold Mining &c. Co. v. O'Sullivan, 27 Colo. 237; 60 Pac. 570 (1900); Old v. Keener, 22 Colo. 6; 43 Pac. 127; Smuggler Union Mining Co. v. Broderick, 25 Colo. 16; 53 Pac. 169.

§ 275. Comparative brightness, capacity, etc.—An ordinary witness who is acquainted with the facts may testify as to how the plaintiff's intelligence or brightness compared with that of other boys of the same age, or whether it was above or below the average. "These are matters upon which ordinary people are capable of forming an intelligent opinion, and which do not require an expert to answer them."[1]

§ 276. Rule of railroad company as evidence.—Upon the question of contributory negligence of an employee of a railroad in coupling cars by hand, a rule of the company, requiring coupling to be done by sticks and not by hand, is admissible in an action under the Alabama Employers' Liability Act.[2]

In an action under the Alabama statute for the negligence of a hostler in starting up a locomotive-switch-engine while the plaintiff was cleaning it, if the defendant railroad relies upon a verbal rule forbidding hostlers to move switch-engines, evidence for the plaintiff that hostlers were nevertheless in the habit of moving such engines is competent to show that the railroad company acquiesced in a breach of its rule.[3]

Rules of a railroad company intended to regulate the conduct of conductors, engineers and brakemen in the

[1] Laplante v. Warren Cotton Mills, 165 Mass. 487, 489; 43 N. E. 294, per Holmes, J.; Hewitt v. Taunton St. R. Co., 167 Mass. 483; 46 N. E. 106; Connors v. Grilley, 155 Mass. 575; 30 N. E. 218; Peaslee v. Fitchburg R. Co., 152 Mass. 155; 25 N. E. 71; Leistritz v. American Zylonite Co., 154 Mass. 382; 28 N. E. 294; Lane v. Moore, 151 Mass. 87; 23 N. E. 828; 21 Am. St. 430.

[2] Memphis &c. R. Co. v. Askew, 90 Ala. 5; 7 So. 823; Richmond &c. R. Co. v. Hissong, 97 Ala. 187; 13 So. 209.

[3] Louisville &c. R. Co. v. Richardson, 100 Ala. 232; 14 So. 209; Hissong v. Richmond &c. R. Co., 91 Ala. 514; 8 So. 776. But see Richmond &c. R. Co. v. Hissong, supra.

management of trains out upon the road are not admissible in evidence where the injury occurred in a freight-yard, and the action is brought under the Employers' Liability Act for the negligence of the conductor in charge and control of a train. The circumstances of the two places are different, and what would be negligent conduct on the road might be proper and necessary in the freight-yard.[1]

§ 277. Interrogatories to the adverse party for discovery.—In Massachusetts, Alabama and other states the common-law courts possess the right under special statutes to compel discovery in advance of trial upon the filing of interrogatories by one party to be answered under oath by the other party.[2]

Under these statutes the fact that the action is brought under the Employers' Liability Act to recover for personal injuries and that discovery could not be had, perhaps, in equity in aid of such an action does not prevent the filing of interrogatories, and obtaining discovery by this means. When the defendant is a corporation the plaintiff "may examine the president, treasurer, clerk or any director or other officer thereof in the same manner as if he were a party to the suit."[3]

This statutory provision seems to have grown out of and been suggested by the practice which prevailed in equity of making an officer a party in a case where discovery was sought from a corporation.[4] "The main purpose of these provisions of the practice act," said

[1] Caron v. Boston &c. R. Co., 167 Mass. 72; 42 N. E. 1085.

[2] Mass. Pub. Sts., ch. 167, §§ 45–53; Mass. Rev. Laws 1902, ch. 173, §§ 57–67; Alabama Code of 1886, §§ 2816–2820.

[3] Mass. Pub. Stats., ch. 167, § 53; Rev. Laws 1902, ch. 173, § 61.

[4] Post v. Toledo &c. R. Co., 144 Mass. 341, 345; 11 N. E. 540; Wilson v. Church, 9 Ch. D. 552, 555, 556; Hancock v. Franklin Ins. Co., 107 Mass. 113, 115.

the court in Wilson v. Webber (Mass.),[1] "was to substitute in place of the tedious, expensive, complex process of a bill of discovery on the equity side of the court an easy, cheap and simple mode of interrogating an adverse party, as incident to and part of the proceedings in the cause in which the discovery was sought."

Where the interrogatories are filed to an officer of the corporation, it often happens that the officer interrogated has no personal knowledge of the matters and facts inquired of, but that he has obtained knowledge or can obtain knowledge by inquiry from his subordinates. In a recent Massachusetts case under the Employers' Liability Act, it has been held that a president of a corporation may be required to answer not only matters of which he has personal knowledge, but also matters pertaining to the accident concerning which he had no personal knowledge and where his answers would necessarily be based upon information and belief.[2] The court said in an opinion by Mr. Justice Morton, that "an admission is none the less binding because made upon information and belief, and for that reason the party interrogating properly may insist that the party interrogated shall make reasonable inquiry of his servants, agents and attorneys who were engaged as such in the transaction in question for the purpose of ascertaining the facts in relation thereto and answering accordingly. The president of a corporation ocupies a position superior in authority to the other officers and to the employees, and generally speaking has a right to require from them information in regard to matters arising in and connected with the discharge of their duties."[3]

[1] 2 Gray (Mass.) 558, 561.

[2] Gunn v. New York &c. R. Co., 171 Mass. 417; 50 N. E. 1031; Toland v. Paine Furniture Co., 179 Mass. 501; 61 N. E. 52 (1901).

[3] Gunn v. New York &c. R. Co., supra, at p. 420.

In England it is also well settled that a party may be compelled to answer respecting matters which he may obtain information of by means of inquiries from his servants, agents or attorneys fairly within his reach.[1]

The circumstance that information may be obtained through witnesses does not deprive a party of the right of discovery through interrogatories filed under such statutes,[2] and the fact that testimony is introduced at the trial in relation to the matters referred to in interrogatories does not cure the error in refusing to order the interrogatories to be answered before the trial.[3]

Under the Alabama code of 1886 a party has a right to file interrogatories to be answered under oath by the adverse party.[4] The purpose is to enable either party to elicit legal evidence from the other party, and is confined to facts which tend to support the claim of the plaintiff or the line of the defense. In an action founded on the Employers' Liability Act it was accordingly held that unsworn reports of the accident made to the defendant by two of its employees were incompetent as original evidence for any purpose, and that the defendant was not bound to annex the reports to its answers to interrogatories propounded by the plaintiff.[5]

§ 278. Photograph of place of injury as evidence.—A photograph of the place of the injury, verified by proof that it is a true representation of the locality, is compe-

[1] Glengall v. Frazer, 2 Hare 99; Anderson v. Bank of British Columbia, 2 Ch. D. 644, 659; Bolckow v. Fisher, 10 Q. B. D. 161; Southwark Water Co. v. Quick, 3 Q. B. D. 321.

[2] Hubbard v. Hubbard, 6 Gray (Mass.) 362.

[3] Gunn v. New York &c. R. Co., 171 Mass. 417; 50 N. E. 1031; Baker v. Carpenter, 127 Mass. 226.

[4] Ala. Code 1886, §§ 2816-2820.

[5] Culver v. Alabama &c. R. Co., 108 Ala. 330; 18 So. 827 (1896).

tent in evidence.[1] Under the Massachusetts practice, the question as to whether the photograph is sufficiently verified is a preliminary question of fact, to be decided by the judge presiding at the trial, and is not open to exception.[2]

§ 279. Res gestæ.—In an action under the Alabama Employers' Liability Act by the administrator of a deceased employee, it was held that a declaration made by the deceased, within five minutes after receiving the fatal injuries, that he supposed it was the carelessness of the foreman, in answer to a question as to how it happened, is not part of the res gestæ, nor admissible on any other principle. It was not made spontaneously, but in an answer to a question; it did not illustrate, or explain, or receive support from the transaction itself, and the time after the injury was too long.[3]

§ 280. Same—Expressions of existing pain.—In Northern Pac. R. Co. v. Urlin[4] the court says, by Mr. Justice Shiras: "The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant they are of

[1] Blair v. Inhabitants &c., 118 Mass. 420; Kansas City &c. R. Co. v. Smith, 90 Ala. 25; 8 So. 43; 24 Am. St. 753; Udderzook v. Commonwealth, 76 Pa. St. 340; Ruloff v. People, 45 N. Y. 213; Church v. City of Milwaukee, 31 Wis. 512.

[2] Blair v. Inhabitants &c., 118 Mass. 420, 421.

[3] Richmond &c. R. Co. v. Hammond, 93 Ala. 181; 9 So. 577. See also, Alabama &c. R. Co. v. Hawk, 72 Ala. 112; Memphis &c. R. Co. v. Womack, 84 Ala. 149; 4 So. 618; Louisville &c. R. Co. v. Pearson, 97 Ala. 211; 12 So. 176.

[4] 158 U. S. 271, 275; 15 S. Ct. 840.

more weight than if made to another person." This was a case of personal injuries to a passenger through the negligence of the defendant railroad; but a like rule applies to injuries suffered by employees in actions against employers, and to other classes.[1] Statements as to pains in the past, however, are not competent evidence in favor of the plaintiff, even when made to his physician for the purpose of medical treatment.[2] When made at a medical examination had for the purpose of preparing evidence, and not for medical treatment, it has been decided that the plaintiff's declarations of present pain are incompetent.[3] A contrary rule would enable parties to make evidence in their own favor, by declarations made out of court and not under oath, when the temptation to exaggerate and lie is very strong.

§ 281. Remoteness—Other like facts.—It seems impossible to frame a general rule which will be of much assistance in determining whether other facts, like those alleged to exist by the plaintiff as the ground of his action for personal injuries, are too remote to be competent as evidence or not. A few illustrations only will be attempted.

In Shea v. Glendale &c. Co. (Mass.)[4] the plaintiff

[1] Davidson v. Cornell, 132 N. Y. 228; 30 N. E. 573 (1892); Hagenlocher v. Coney Island &c. R. Co., 99 N. Y. 136; 1 N. E. 536; Matterson v. New York Cent. R. Co., 35 N. Y. 487; 91 Am. D. 67; Roche v. Brooklyn City &c. R. Co., 105 N. Y. 294; 11 N. E. 630; 59 Am. R. 506; Barber v. Merriam, 11 Allen (Mass.) 322; Fay v. Harlan, 128 Mass. 244; 35 Am. R. 372; Fleming v. City of Springfield, 154 Mass. 520; 28 N. E. 910; Cleveland &c. R. Co. v. Newell, 104 Ind. 264; 3 N. E. 836 (1885).

[2] Davidson v. Cornell, 132 N. Y. 228; 30 N. E. 573 (1892); Towle v. Blake, 48 N. H. 92.

[3] Grand Rapids &c. R. Co. v. Huntley, 38 Mich. 537; 31 Am. R. 321; Jones v. President &c., 88 Mich. 598; 50 N. W. 731; 16 L. R. A. 437; Darrigan v. New York &c. R. Co., 52 Conn. 285, 309; 52 Am. R. 590 (1884).

[4] 162 Mass. 463; 38 N. E. 1123.

alleged that he was poisoned by inhaling dust containing white lead, which came from the rubber thread on which he worked in the defendant's mill. The plaintiff offered to show that other operatives who worked in the same room with the plaintiff, at the same time and at a few months prior and subsequent thereto, had suffered from lead-poisoning. It was held that the evidence was admissible.

In Myers v. Hudson Iron Co. (Mass.)[1] the plaintiff was injured while being lowered into a mine, by the failure of a brake to work properly and control the descent. It was held that evidence was competent to show slips on previous occasions of the bucket while in use for hoisting ores, which slips had been brought home to the knowledge of the defendant's superintendent.

In Boston Woven Hose &c. Co. v. Kendall (Mass.),[2] where the claim was that the defendants had made a defective naphtha-tank for the plaintiff, which had caused an explosion and injured the plaintiff's employees, for which injuries the plaintiff paid, it was held that evidence was admissible to prove that similar experiments were subsequently made without any explosion with another tank made by the defendants from the same plans and specifications.

In Dye v. Delaware &c. R. Co. (N. Y.)[3] it was ruled that evidence was incompetent in an action by an employee for injuries received in coupling cars to show that similar accidents had occurred on the defendant's railroad.

For other illustrations of what evidence is admissible or inadmissible upon the ground of remoteness, in personal-injury suits, see cases cited in the note.[4]

[1] 150 Mass. 125; 22 N. E. 631; 15 Am. St. 176.
[2] 178 Mass. 232; 59 N. E. 657.
[3] 130 N. Y. 671; 29 N. E. 320 (1891).
[4] Tremblay v. Harnden, 162 Mass. 383; 38 N. E. 972; Craven v.

§ 282. Compromise offers.—Neither at common law[1] nor under the Employers' Liability Act[2] is the admission of a party, made by way of compromise or amicable adjustment of a claim for personal injuries against an employer, competent evidence against the party making it. In Collier v. Coggins, ubi supra, it was held to be error to allow the plaintiff to prove that the defendant had stated to the plaintiff that he thought the plaintiff could get seventy-five dollars in compromise of his claim.

§ 283. Mortality tables.—In Alabama and some other jurisdictions it is held that the American mortality tables, and other standard life and annuity tables, are admissible in evidence, in actions for personal injuries to employees, upon the question of the plaintiff's probable length of life. Even when the plaintiff's occupation is more hazardous than that of the persons included in the tables, they are still admissible, but this circumstance should be considered by the jury in estimating his expectancy of life and in fixing the amount of damages.[3] "They are not conclusive upon the question of the duration of life, but are competent to be weighed with other evidence. The physical condition of the injured person at the time of and next preceding the injury, his general health, his avocation in life with respect to danger, his habits, and

Mayers, 165 Mass. 271; 42 N. E. 1131 (1896); Brewing Co. v. Bauer, 50 Ohio St. 560; 35 N. E. 55; 40 Am. St. 686; McCulloch v. Dobson, 133 N. Y. 114; 30 N. E. 641; Cleveland &c. R. Co. v. Wynant, 114 Ind. 525; 17 N. E. 118; Ramsey v. Rushville &c. Gravel Road Co., 81 Ind. 394.

[1] Jackson v. Clopton, 66 Ala. 29.

[2] Collier v. Coggins, 103 Ala. 281; 15 So. 578.

[3] Birmingham &c. R. Co. v. Wilmer, 97 Ala. 165; 11 So. 886; Richmond &c. R. Co. v. Hissong, 97 Ala. 187; 13 So. 209; Central Railroad v. Richards, 62 Ga. 306; Sauter v. New York Cent. R. Co., 66 N. Y. 50; 23 Am. R. 18; McDonald v. Chicago &c. R. Co., 26 Iowa 124; 95 Am. D. 114; Vicksburg &c. R. Co. v. Putnam, 118 U. S. 545; 7 S. Ct. 1; Kerrigan v. Pennsylvania R. Co., 194 Pa. St. 98; 44 Atl. 1069.

probably other facts, properly enter into the question of the probable duration of life.'"[1]

§ 284. Judicial notice—Statutes of other states must be proved in state courts.—The court can not take judicial notice of what mechanism is in a car-brake; nor when or how it is liable to get out of repair; nor what causes it to stick.[2]

In the courts of most of the states the statutory law of a sister state is regarded, not as matter of law of which the court will take judicial notice, but as matter of fact which must be both alleged and proved.[3] It follows from this rule that a person who sues in one state under a statute of another state, for a personal injury received in such other state, must allege and prove the law of such other state as a fact, and also the facts which give him a right of action under that law.[4] When the right of action is given by statute of the state of process, there is no presumption that the state where the injury was received has a like statute.[5]

When the common law of the state of process does not give a right of action for a cause of action arising in and governed by the law of another state, the law of such other

[1] Mary Lee Coal Co. v. Chambliss, 97 Ala. 171, 175; 12 So. 607, per Coleman, J., for the court.

[2] Louisville &c. R. Co. v. Binion, 98 Ala. 570; 14 So. 619.

[3] Knapp v. Abell, 10 Allen (Mass.) 485, 488; Seymour v. Sturgess, 26 N. Y. 134; Rice v. Merrimack Co., 56 N. H. 114; Salt Lake Nat'l Bank v. Hendrickson, 40 N. J. L. 52; Coates v. Mackey, 56 Md. 416, 419; Horton v. Critchfield, 18 Ill. 133; 65 Am. D. 701; Cincinnati &c R. Co. v. McMullen, 117 Ind. 439; 20 N. E. 287.

[4] McLeod v. Connecticut &c. R. Co., 58 Vt. 727; 6 Atl. 648; Leonard v. Columbia Nav. Co., 84 N. Y. 48; 38 Am. R. 491; Palfrey v. Portland &c. R. Co., 4 Allen (Mass.) 55, 56; Post v. Toledo &c. R. Co., 144 Mass. 341, 342; 11 N. E. 540; 39 Am. R. 36; Walsh v. New York &c. R. Co., 160 Mass. 571; 36 N. E. 584; 39 Am. St. 514.

[5] Selma &c. R. Co. v. Lacy, 43 Ga. 461; Whitford v. Panama R. Co., 23 N. Y. 465; Wooden v. Western New York &c. R. Co., 126 N. Y. 10; 26 N. E. 1050; 22 Am. St. 803; 13 L. R. A. 458; State v. Pittsburgh &c. R. Co., 45 Md. 41.

state must be proved as a fact, and will not be taken notice of by the court unless so proved at the trial. Even when the state of process has a statute conferring the right of action, the court will not presume, without proof, that the law of the other state is the same.[1]

In Kelley v. Kelley (Mass.)[2] Mr. Justice Allen, for the court, says: "In the absence of anything to show the contrary, there is a presumption that the common law of another state is like that prevailing here; but this presumption does not extend to the statutes of another state."[3] "These [statutes] must be proved as facts at the trial; and where a question of the law of another state is in controversy, the party upon whom the burden lies will fail unless evidence is produced to sustain his view; and statutes and decisions which were not put in evidence at the trial can not be used for the first time at the argument of the case before us for the purpose of proving the law of such state."[4]

In North Carolina, if the injury occurs in another state whose law is not proved as a fact, it has been held that there is no presumption that its common law is the same as that of England where the English law was not settled until after the independence of the United States. Upon the question of the employer's liability to one servant for the negligence of a fellow servant, as this question was not settled in England until 1837 by Priestley v. Fowler,[5] the supreme court of North Carolina has decided that the

[1] Whitford v. Panama R. Co., 23 N. Y. 465.

[2] 161 Mass. 111, 112; 36 N. E. 837; 42 Am. St. 389; 25 L. R. A. 806.

[3] Citing Harris v. White, 81 N. Y. 532, 544; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17.

[4] Kelley v. Kelley, supra, p. 114; citing Hunt v. Johnson, 44 N. Y. 27; 4 Am. R. 631; Hull v. Mitcheson, 64 N. Y. 639; Hacket v. Potter, 135 Mass. 349, 350; Murphy v. Collins, 121 Mass. 6; Ufford v. Spaulding, 156 Mass. 65, 69; 30 N. E. 360.

[5] 3 M. & W. 1.

law of Tennessee will not be presumed to be like that of the common law of England.[1]

§ 285. Same—When federal courts will take judicial notice of laws of other states.—The federal courts, when exercising their original jurisdiction, take judicial notice, without allegation or proof, of the public laws of all the states, as well as of the United States. This includes not only the laws of the state in which they sit, but also the laws of the other states.[2] The state courts, however, generally regard the laws of other states as matter of fact, of which they will not take judicial notice, and which must be alleged and proved.[3]

When the supreme court of the United States is exercising appellate jurisdiction, whatever was regarded as matter of fact in the court below is regarded as matter of fact in the supreme court; and whatever was regarded as matter of law in the court below is regarded as matter of law in the supreme court. Hence, on a writ of error to a state court, in which the law of another state was regarded as matter of fact, the supreme court of the United States will also regard it as matter of fact, and will not take judicial notice of it.[4] But if the state court has taken judicial notice of the law of another state, the United States supreme court will also take judicial notice of it, and is not bound by the conclusion reached by the state court.[5]

§ 286. Surgical examination of plaintiff.—In an action brought for personal injuries occasioned to the plaintiff

[1] Williams v. Southern R. Co., 128 N. C. 286; 38 S. E. 893 (1901).

[2] Owings v. Hull, 9 Peters 607; Lamar v. Micou, 114 U. S. 218; 5 S. Ct. 857; Fourth Nat'l Bank v. Francklyn, 120 U. S. 747, 751; 7 S. Ct. 757.

[3] Ante, § 284.

[4] Hanley v. Donoghue, 116 U. S. 1; 6 S. Ct. 242; Chicago &c. R. Co. v. Wiggins Ferry Co., 119 U. S. 615; 7 S. Ct. 398.

[5] Renaud v. Abbott, 116 U. S. 277; 6 S. Ct. 1194.

by reason of the defendant's negligence, there is much conflict among the decisions as to whether or not, in the absence of an enabling statute, the court can compel the plaintiff to submit his person to a surgical or medical examination in order to qualify the examiner as a witness. In New York, Massachusetts, Indiana, and some other states, as well as in the federal courts, it has been decided that the trial court has no inherent power to continue the case or to nonsuit the plaintiff in case he refuses to submit to such an examination, but that such refusal is a subject of just comment to the jury.[1]

On the other hand it has been held in Alabama, Iowa, Ohio, Kansas, Wisconsin, and some other states that even in the absence of an enabling statute the courts have the power to order a plaintiff to submit his person to such an examination, and if he refuses to do so, to nonsuit or continue the action.[2]

In 1896 the legislature of New Jersey passed an enabling act in these words: "On or before the trial of any action brought to recover damages for injury to the person, the

[1] McQuigan v. Delaware &c. R. Co., 129 N. Y. 50; 29 N. E. 235; 26 Am. St. 507; 14 L. R. A. 466; Stack v. New York &c. R. Co., 177 Mass. 155; 58 N. E. 606; Pennsylvania Co. v. Newmeyer, 129 Ind. 401; 28 N. E. 860; Union Pac. R. Co. v. Botsford, 141 U. S. 250; 11 S. Ct. 1000; Camden &c. R. Co. v. Stetson, 177 U. S. 172; 20 S. Ct. 617; Roberts v. Ogdensburgh R. Co., 29 Hun (N. Y.) 154; McSwyny v. Broadway &c. R. Co., 27 N. Y. St. 363; 7 N. Y. Supp. 456; Graves v. City of Battle Creek, 95 Mich. 266; 54 N. W. 757; 35 Am. St. 561; 19 L. R. A. 461. But when the plaintiff claims that his injury has caused the secretion of albumen and sugar in his urine, he may be required to produce in court, for analysis, specimens of his urine, accompanied by an affidavit that it was passed by him, as this does not invade the privacy of his person: Cleveland &c. R. Co. v. Huddleston, 151 Ind. 540; 46 N. E. 678 (1897).

[2] Alabama &c. R. Co. v. Hill, 90 Ala. 71; 8 So. 90; 24 Am. St. 764; 9 L. R. A. 442; Schroeder v. Chicago R. Co., 47 Iowa 375; Miami Co. v. Baily, 37 Ohio St. 104; Atchison &c. R. Co. v. Thul, 29 Kan. 466; 44 Am. R. 659; White v. Milwaukee &c. R. Co., 61 Wis. 536; 21 N. W. 524; 50 Am. R. 154; Hatfield v. St. Paul &c. R. Co., 33 Minn. 130; 22 N. W. 176; 53

court before whom such action is pending may, from time to time, on application of any party therein, order and direct an examination of the person injured, as to the injury complained of, by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination, to testify in the said cause as to the nature, extent and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination; provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore."[1]

New York also has a similar statute, and these statutes have been held to be constitutional and have been enforced in their respective jurisdictions.[2]

In the absence of such an enabling statute, the federal courts will not make an order compelling the plaintiff to submit his person to a surgical examination.[3] But where such a statute exists in the state of process the federal courts will be governed thereby, and will adopt the state practice in trials at common law, under United States revised statutes, section 721, as the state statute then forms a "rule of decision" for the federal courts.[4]

The fact that there is legislation empowering the court to order a view of the place in question, or of "any property, matter or thing relating to the controversy between

Am. R. 14; Stuart v. Havens, 17 Neb. 211; 22 N. W. 419; Owens v. Kansas City R. Co., 95 Mo. 169; 8 S. W. 350; 6 Am. St. 39; Sibley v. Smith, 46 Ark. 275; 55 Am. R. 584; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95; 10 S. W. 325; Richmond &c. R. Co. v. Childress, 82 Ga. 719; 9 S. E. 602; 14 Am. St. 189; 3 L. R. A. 808.

[1] N. J. Acts 1896, ch. 202.

[2] McGovern v. Hope, 63 N. J. L. 76; 42 Atl. 830; Camden &c. R. Co. v. Stetson, 177 U. S. 172; 20 S. Ct. 617; Lyon v. Manhattan R. Co., 142 N. Y. 298; 37 N. E. 113; 25 L. R. A. 402.

[3] Union Pac. R. Co. v. Botsford, 141 U. S. 250; 11 S. Ct. 1000.

[4] Camden &c. R. Co. v. Stetson, 177 U. S. 172; 20 S. Ct. 617.

the parties," or to compel the answer to interrogatories and the exhibition of all documents under the penalty of a nonsuit or default, does not authorize the court to order such an examination of the injured plaintiff. The common law regarded with sanctity the inviolability of the persons of free citizens, and statutes will not be construed as conferring this power unless the meaning is clear and free from ambiguity. "The need of the power," says Chief Justice Holmes in Stack v. New York &c. R. Co. (Mass.),[1] "easily may be exaggerated, because if, contrary to usual experience, a plaintiff should dare to refuse a reasonable examination, it would be the subject of just comment to the jury. But if the power should be deemed needful to a more perfect administration of justice, the remedy should be furnished by the legislature, which, as yet, has not gone so far. * * * We can not doubt that as matter of history the power which we are asked to assert was of a kind rarely claimed or exercised by common-law courts. It is said by Mr. Langdell that 'the common-law procedure is founded upon the theory that the parties to an action owe no obedience to the court."[2] And, although, of course, as recognized by the author, the statement must not be taken too absolutely, it indicates an important truth. It also is true, perhaps with some reservations, as observed by Mr. Justice Gray in the supreme court of the United States, that the common law was very slow to sanction any violation of or interference with the person of a free citizen. The few and obsolete specific cases in which the judges or a jury inspected the person of a party have little bearing on the court's power to order him to submit to inspection in order to qualify a witness."[3]

[1] 177 Mass. 155, 157; 58 N. E. 686.

[2] Langdell Eq. Pl. (2d ed.), § 40.

[3] Compulsory inspection of the person of a litigant has been enforced in three other classes of cases: (1) Witch trials, in order to discover

§ 287. Condition before and after accident.—An employee has a right to exhibit the injured part of his body to the jury, and in some states the employer sued for the injury has the right to compel its exhibition, or submission to a surgical examination.

In an action under the Alabama Employers' Liability Act it was held by the supreme court that the trial court did not err in permitting the plaintiff to exhibit his injured hand to the jury, because the injury itself threw light upon the extent of the injury and the damage sustained: "We presume," added the court, "that if the plaintiff had testified to the loss of a hand, and the truth was that he had lost only a finger, the defendant would have the right to require the plaintiff to exhibit his hand."[1]

witch marks on the accused, for the purpose of showing that he was in league and covenant with the devil, and had sold himself, body and soul, to his satanic majesty: Savage's Winthrop, II, 397; Hutchinson (2d ed.), II, 59, note; Washburn's Judicial Hist. Mass. 143. (2) Jury of matrons to determine whether a widow who claimed to be with child, which would inherit property, was actually pregnant or feigning: 1 Bl. Com. 456; In re Blackmore, 14 L. J. (Ch.) (N. S.) 336. (3) Divorce suits, charging impotency: Le Barron v. Le Barron, 35 Vt. 365; Devanbagh v. Devanbagh, 5 Paige (N. Y.) 554; 28 Am. D. 443; Briggs v. Morgan, 3 Phill. 325. The opinion of Mr. Justice Gray, in Union Pac. R. Co. v. Botsford, 141 U. S. 250; 11 S. Ct. 1000, contains a learned discussion of this question.

[1] Alabama &c. R. Co. v. Roach, 110 Ala. 266, 273; 20 So. 132 (1895), per Coleman, J.

CHAPTER XVIII.

PLEADING AND PRACTICE.

SECTION

288. Omission to allege name of superintendent, or other person causing injury.
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SECTION

301. New trial when verdict is against the evidence.
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312. Amendment in appellate court.

§ 288. Omission to allege name of superintendent, or other person causing injury.—A count based upon the

superintendence clause of the Alabama Employers' Liability Act should allege the name of the superintendent, because the plaintiff ordinarily has a better opportunity to know the person whose negligence caused his injury than the common employer has. A failure to aver his name renders the count demurrable.[1]

In Southern R. Co. v. Cunningham, just cited, a judgment for the plaintiff was reversed because a count based upon the negligence of a person in the charge or control of a signal-point omitted to allege the name of such person, the count having been demurred to in the trial court.

In Alabama it has been strongly intimated, though not expressly decided, that, in an action under the statute counting on the negligence of a person to whose orders the plaintiff was bound to conform and did conform to his injury,, good pleading requires the name of such person to be alleged in the complaint, so as to give the defendant notice thereof, and to present an issuable fact whether such person was in the employ of defendant, or whether the plaintiff was bound to conform to his orders.[2] A failure to allege the name of such person can be taken advantage of by special demurrer only, if at all, and it is cured by verdict.[3]

In a complaint under the act counting on the negligence of a person entrusted with the duty of seeing that the ways, works, machinery, or plant of the defendant were in proper condition, it has been decided, however, that an omission to state the name of such person is not demurrable. "The duty itself being one which rests on

[1] Woodward Iron Co. v. Herndon, 114 Ala. 191, 215; 21 So. 430 (1897); Southern R. Co. v. Cunningham, 112 Ala. 496; 20 So. 639; George v. Mobile &c. R. Co., 109 Ala. 245; 19 So. 784.

[2] McNamara v. Logan, 100 Ala. 187, 194; 14 So. 175.

[3] Mobile &c. R. Co. v. George, 94 Ala. 199, 214, 215; 10 So. 145.

the master, at least to the extent of committing it to a competent employee, he is supposed to know, and generally no doubt does know, the identity of the person to whom it is committed. There is, therefore, no hardship, and no departure from cardinal rules of pleading, in exempting the plaintiff from the averment of the name of such person in actions like this."[1]

§ 289. Undue particularity—Allegation that employer knew of defect.—Under the Alabama Employers' Liability Act it is not necessary for the plaintiff to allege or prove that the employer had knowledge of the defect before the injury was received.[2] In Louisville &c. R. Co. v. Coulton, just cited, a brakeman was injured by a defective brake. The complaint alleged that the injury "was caused by the negligence of defendant in failing to provide good and safe brakes and appliances connected therewith, and by the defendant's negligently and carelessly omitting to keep its brakes on said train in good repair, and *knowingly* allowing the same to remain out of repair." At the trial the plaintiff failed to prove that the defendant had knowledge of the defect, and the defendant contended that as the plaintiff had stated his case with unnecessary particularity, he was obliged to prove it as alleged. But the court held that this was not matter of description within the meaning of the rule, and that the plaintiff could recover without proof of such knowledge.

§ 290. Allegation of "due" notice.—It is not necessary that the declaration should state the time when notice of the time, place and cause of the injury was given. An

[1] McNamara v. Logan, supra, per McClellan, J., for the court; Woodward Iron Co. v. Herndon, 114 Ala. 191, 215; 21 So. 430; overruling Louisville &c. R. Co. v. Bouldin, 110 Ala. 185; 20 So. 325.

[2] Louisville &c. R. Co. v. Coulton, 86 Ala. 129; 5 So. 458.

allegation that the plaintiff gave "due" notice of those facts, or that he "duly" gave such notice, is sufficient.[1]

§ 291. Plea of contributory negligence, and waiver thereof.—Under the Alabama practice the defense of contributory negligence is not available under the general issue, or plea of not guilty, but must be specially pleaded; and whenever the introduction of such evidence under the general issue is objected to, the objection should be sustained and the evidence excluded.[2] But this is an objection which may be waived by the plaintiff, and when the record shows that both parties tried the case as if a special plea had been set up, although the record shows no other plea than the general issue, this will constitute a waiver of the objection.[3]

In Massachusetts, however, the rule is well settled that contributory negligence or want of due care on the part of the plaintiff may be shown under the general issue, without a special plea.[4]

The Indiana act of February 17, 1899, provides, reversing the previous rule, that contributory negligence shall be a matter of defense and the want of it need not be alleged or proved by the plaintiff, but that this defense may be proved under an answer of general denial. This statute has been held constitutional by the supreme court,[5] but whether it relieves the plaintiff in an action under the Employers' Liability Act from alleging and proving that he was "in the exercise of due care and diligence," has not yet been decided.

[1] Steffe v. Old Colony R. Co., 156 Mass. 262; 30 N. E. 1137.

[2] Kansas City &c. R. Co. v. Crocker, 95 Ala. 412; 11 So. 262; overruling Government St. R. Co. v. Hanlon, 53 Ala. 70.

[3] Richmond &c. R. Co. v. Farmer, 97 Ala. 141; 12 So. 86; Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714.

[4] Steele v. Burkhardt, 104 Mass. 59, 62; 6 Am. R. 191.

[5] Indianapolis St. R. Co. v. Robinson, 157 Ind. 414; 61 N. E. 197 (1901); ante, § 224.

§ 292. General issue admits capacity in which plaintiff sues or defendant is sued.—Under the Alabama practice, when a plaintiff sues as administrator of a deceased employee, his capacity to sue is admitted by pleading the general issue, and can only be put in issue by a plea of ne unques administrator. "The general issue in no case puts in issue any fact the burden of proving which primarily is not upon the plaintiff." Hence, when a plaintiff sues in his representative capacity under the Employers' Liability Act, and the defendant pleads the general issue, the plaintiff need offer no proof of his appointment, as it is admitted by the plea.[1] The general issue also admits the capacity in which the defendant is sued, as that it is a corporation.[2]

A like rule prevails in Massachusetts under a statute providing that: "When it appears from the papers or pleadings in a suit at law or in equity that any party sues or is sued as executor, administrator, guardian, trustee, or assignee, or as a corporation, such fact shall be taken as admitted unless the party controverting the same files in court, within ten days from the time allowed for answer, a special demand for proof of such fact."[3]

§ 293. Election between statutory counts and joinder thereof.—The early cases under the Massachusetts act hold that if the declaration contains two or more counts under different clauses of the statute, and there is no evidence at the trial to support one of them, the plaintiff may be compelled to elect which count he will stand upon; and if he elects to drop the count which is unsupported by evidence, he is not aggrieved by the ruling to

[1] Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870.
[2] Zealy v. Birmingham R. &c. Co., 99 Ala. 579; 13 So. 118.
[3] Mass. Pub. Sts., ch. 167, § 87; Rev. Laws 1902, ch. 173, § 123.

elect.[1] But the later and better practice is not to compel the plaintiff to elect upon which count he will proceed. The reasons for this rule are thus stated by Mr. Chief Justice Field, speaking for the court in the case of Beauregard v. Webb Granite &c. Co. (Mass.):[2] "The clauses in the first section of the statute state the separate grounds on which a defendant may be liable. The evidence in any particular case may make it uncertain on which ground the liability of the defendant depends, if there is any liability; therefore a plaintiff ought to be permitted to allege all the grounds of liability which there is any evidence to support, and these we think may properly be alleged separately in separate counts. Whether they can all be alleged conjunctively in one count, it is unnecessary now to decide. The whole liability of the defendant for the death (or injury) of an employee ought to be tried in one action, and judgment in that action ought to be a bar to any subsequent action between the same parties for the same cause of action." It was accordingly held that two counts under different clauses of the statute are not inconsistent in the legal sense, for "they only state separate grounds of liability under the same statute for the same ultimate act. There are not two causes of action, but only one, and the two counts state the different legal reasons why under the statute the defendant may be liable in damages."

If there is no evidence to support one of the counts, the proper practice is to nonsuit the plaintiff upon that count, or to direct a verdict for the defendant upon it.

A like rule obtains in Alabama under its Employers' Liability Act.[3] In Highland Ave. &c. R. Co. v. Dusen-

[1] Conroy v. Inhabitants &c., 158 Mass. 318; 33 N. E. 525.
[2] 160 Mass. 201, 202; 35 N. E. 555.
[3] Louisville &c. R. Co. v. Mothershed, 97 Ala. 261; 12 So. 714.

berry (Ala.),[1] in which it was held that several distinct causes of action under the act could not be joined in one and the same count, Mr. Justice Walker, for the court, says on page 418: "It is quite usual in actions for torts, where a single act or transaction is complained of as the cause of the alleged injury, to insert several counts stating that act in varying shapes, to meet different phases of the proof as it may be developed, and to charge in the successive counts different breaches of duty as separate grounds of recovery. Each count is treated as the statement of a distinct cause of action, and appropriate issues may be pleaded to them severally."[2]

§ 294. Election between counts at common law and under the statute, and joinder thereof.—The same rule ought to apply to this case as to that stated in the preceding section.[3] As decided in Beauregard v. Webb Granite &c. Co. (Mass.)[4] the whole question of liability for personal injury caused by a single act should be tried in one action, and settled once for all. An employer should not be harassed by several actions for the same injury, nor should the employee be compelled to bring several actions, and to try his case piecemeal. If there is no evidence to support one of the counts, a verdict may be ordered for the defendant upon that count, or the plaintiff may be nonsuited upon it. But he should not be compelled to elect between common law and statutory counts, unless the issues are so different and complicated as to confuse the jury.

In some cases, where the plaintiff was ordered to elect between such counts at the close of the evidence, and he

[1] 94 Ala. 413; 10 So. 274.

[2] Citing Maupay v. Holley, 3 Ala. 103.

[3] Ryalls v. Mechanics' Mills, 150 Mass. 190, 196; 22 N. E. 766; 5 L. R. A. 667.

[4] 160 Mass. 201; 35 N. E. 555.

elected to drop a count which was unsupported by evidence, it was held that the plaintiff was not aggrieved by the ruling to elect, and could not obtain a new trial on that ground.[1] So, if the issues under the two counts be identical, it has been held that the plaintiff can not except to such ruling.[2]

§ 295. Joinder of separate causes of action in one count.—In an action under the Alabama Employers' Liability Act, it has been held that a count which alleges four separate and distinct causes of action, under different clauses of the act, is demurrable for improper joinder of causes of action, and that a verdict and judgment for the plaintiff in the lower court will be reversed for that reason by the supreme court.[3] Even when only one cause of action is relied upon at the trial, and the presiding justice instructs the jury that no recovery can be had upon the others, this does not cure the error in overruling the defendant's demurrer.[4]

§ 296. "Reporting" case upon nonsuit.—Under the Massachusetts practice it is not strictly regular for the trial judge to report the case for the determination of the full court after ordering a nonsuit;[5] but where more than a year had elapsed after the injury, which barred a new action under section 3 of the statute, the court considered the question of law raised upon the report on its merits, instead of dismissing the report.[6]

§ 297. Variance between declaration and proof.—In an action under the Massachusetts Employers' Liability Act

[1] May v. Whittier Machine Co., 154 Mass. 29; 27 N. E. 768.
[2] Murray v. Knight, 156 Mass. 518; 31 N. E. 646; Brady v. Ludlow Mfg. Co., 154 Mass. 468; 28 N. E. 901.
[3] Highland Ave. &c. R. Co. v. Dusenberry, 94 Ala. 413; 10 So. 274.
[4] Richmond &c. R. Co. v. Weems, 97 Ala. 270; 12 So. 186.
[5] Pub. Sts., ch. 153, § 6; Terry v. Brightman, 129 Mass. 535.
[6] Shea v. Boston &c. R. Co., 154 Mass. 31, 33; 27 N. E. 672.

the declaration alleged that the injury was sustained "because of the falling in of the roof of said tannery," and further alleged that "the condition of said tannery and the roof thereof was defective and unsafe, and that said defective and unsafe condition of said tannery and roof had not been discovered and remedied owing to the negligence of the defendants, and of the person in the service of the defendants entrusted by them with the duty of seeing that said tannery and roof were in proper condition." The proof was that the chief cause, or one of the causes, of the fall of the roof was the failure to remove snow which had accumulated upon it. It was held that evidence of the cause of the roof's falling was competent under the declaration, and that there was no variance.[1]

In an action under the Alabama Employers' Liability Act it was held that an allegation that the plaintiff was injured by reason of the negligence of some person in the defendant's employ, who had the control and superintendence of a moving car, is supported by proof that the injury was caused by the negligence of an engineer who propelled a switching-car with too great force.[2]

Where the action is brought jointly against two railroad companies, by a man who was employed by both companies at their railroad crossing, proof that at the time of the injury, caused while coupling cars, he was acting exclusively for only one of the railroads, constitutes a fatal variance under the Alabama practice, and prevents a recovery against either defendant under the Employers' Liability Act.[3]

§ 298. Nonsuit no bar to new action.—A nonsuit ordered by the trial court, even after hearing all the evidence,

[1] Dolan v. Alley, 153 Mass. 380; 26 N. E. 989. See also, Whitman v. Inhabitants &c., 131 Mass. 553.

[2] Louisville &c. R. Co. v. Davis, 91 Ala. 487; 8 So. 552.

[3] Dean v. East Tennessee &c. R. Co., 98 Ala. 586; 13 So. 489.

is not such a judgment upon the merits as will bar a new action for the same injury. The plaintiff may still bring another action in some other jurisdiction whose rules are more favorable to his recovery. Thus, the plaintiff may sometimes recover in a federal court sitting either within the state whose court ordered the nonsuit, or within other states.[1]

So likewise the plaintiff may sometimes recover in a state court for personal injuries after a federal court has decided against him on demurrer. Thus in Lyon v. Union Pac. R. Co.[2] it was held on demurrer that a right of action for personal injuries resulting in death died with the person injured, and that this action, therefore, could not be maintained. Subsequently another action for the same cause was brought in a state court of Colorado, and it was held that the former judgment constituted no bar to this action brought by the administrator of the deceased.[3]

In Colorado the trial court has the power at the close of plaintiff's evidence to order a nonsuit or a verdict for the defendant. If a nonsuit be ordered, though after hearing the plaintiff's case, it will not bar a subsequent action for the same cause of action, but a judgment on a verdict ordered for the defendant will bar another action.[4]

§ 299. Power of supreme court to render such judgment as the trial court should have rendered.—Under section 7 of the Alabama acts of 1888–89, page 797, at

[1] Gardner v. Michigan Cent. R. Co., 150 U. S. 349; 14 S. Ct. 140; Bucher v. Cheshire R. Co., 125 U. S. 555; 8 S. Ct. 974; Manhattan Ins. Co. v. Broughton, 109 U. S. 121; 3 S. Ct. 99; Homer v. Brown, 16 How. 354; Brown v. Homer, 3 Cush. (Mass.) 390.

[2] 35 Fed. 111.

[3] Kelley v. Union Pac. R. Co., 16 Colo. 455; 27 Pac. 1058.

[4] Denver &c. R. Co. v. Iles, 25 Colo. 19; 53 Pac. 222 (1898); Westcott v. Bock, 2 Colo. 335; Tripp v. Fiske, 4 Colo. 24; Charles v. People's Ins. Co., 3 Colo. 419.

page 800, when a case has been tried without a jury in the lower court, the supreme court has the power to "render such judgment in the cause as the court below should have rendered, or reverse and remand the same for further proceedings, as to the supreme court shall seem right." The section further provides that "either party may, by bill of exceptions, also present on appeal, for review, the conclusions and judgments of the [trial] court upon the evidence; and the supreme court shall review the same without any presumption in favor of the court below on the evidence."

In an action under the Employers' Liability Act the supreme court, acting under the above-quoted statute, reduced the judgment of the trial court from $2,500 to $1,650.[1]

§ 300. Jury's refusal to find as directed by the court.— It is the duty of the jury to obey the peremptory instruction of the judge to return a verdict in favor of one party or the other. To hold otherwise would be to vest the jury with power to review the decision of the court on the law of the case. The verdict is one way of placing on record the judgment of the court. If the jury object to finding as the court directs, they may avoid responsibility by returning a verdict in this form: "We, the jury, find for the defendant in obedience to the peremptory instruction of the court."[2] The judge has this power even after the jury have reported a disagreement.[3]

§ 301. New trial when verdict is against the evidence.— In Massachusetts and some other states the judge who presided at a jury trial may grant a new trial when he considers the verdict is contrary to the evidence, or to the

[1] Louisville &c. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870.

[2] Curran v. Stein, 22 Ky. L. 1575; 60 S. W. 839 (1901).

[3] International Trust Co. v. Wilson, 161 Mass. 80; 36 N. E. 589 (1894); Nichols v. Mumsell, 115 Mass. 567.

weight of evidence; but the full court can not grant a new trial on either of those grounds.[1] In Alabama and some other states, however, the full court, in reviewing the judgment of the trial court, has the power to grant a new trial on either of these grounds.[2] In Alabama, in order to justify the full court in granting a new trial for these reasons, the preponderance of evidence against the verdict, after making all reasonable presumptions in its favor, must be so decided as clearly to convince the court that it is wrong and unjust.[3]

Where the preponderance of the evidence is so decided as to leave no substantial doubt that the verdict is wrong and unjust, the supreme court will set aside the verdict and grant a new trial and reverse the judgment of the lower court.[4]

An employee injured by the alleged negligence of the defendant has a right to be present in court when his case is tried, although his appearance is such as to excite the sympathy of the jury. Allowing the plaintiff to remain within view of the jury during the trial is, therefore, no ground for granting a new trial.[5]

§ 302. Restricting new trial to certain issues.—In Massachusetts the rule is well settled that in granting a new trial the full court may, under certain circumstances, restrict the trial to specific issues and eliminate therefrom

[1] Forsyth v. Hooper, 11 Allen (Mass.) 419; Taylor v. Carew Mfg. Co., 140 Mass. 150, 151; 3 N. E. 21.

[2] Cobb v. Malone, 92 Ala. 630; 9 So. 738; Hall v. Page, 4 Ga. 428; 48 Am. D. 235; Central R. Co. v. Richards, 62 Ga. 306; Hicks v. Stone, 13 Minn. 434.

[3] Mary Lee Coal Co. v. Chambliss, 97 Ala. 171; 11 So. 897; Western R. Co. v. Mutch, 97 Ala. 194; 11 So. 894; 38 Am. St. 179; 21 L. R. A. 316.

[4] Davis v. Miller, 109 Ala. 589; 19 So. 699 (1896) (action under Employers' Liability Act).

[5] Denver &c. R. Co. v. Smock, 23 Colo. 456; 48 Pac. 681 (1897).

other issues which were tried and determined without error in the former trial.[1] A like rule prevails in granting new trials in actions under the Employers' Liability Act. If two counts under the act be joined in one declaration, and error be committed at the trial respecting one count but none respecting the other count, the new trial will be confined to the former and denied as to the latter count;[2] also when the declaration contains a count under the statute and another count at common law.[3]

If error has been committed at the trial upon the question of damages but no error upon the question of the defendant's liability as an employer, the supreme court may limit the new trial to the question of damages.[4]

A general verdict rendered upon several counts in the declaration may be entered upon one count therein, where there is only one cause of action.[5]

§ 303. Setting aside verdict by trial court—Number of times allowable.—In Massachusetts and elsewhere it is held that there is no limit to the number of times that the presiding justice may set aside a verdict as against the evidence or the weight of evidence.[6] Nor does the fact that the judge had refused to direct a verdict for the defendant at the trial prevent him from subsequently setting it aside on this ground. Both of these points were decided in Clark v. Jenkins (Mass.),[7] in which a third verdict for the plaintiff, in an action under the Employers' Liability

[1] Merchants' Ins. Co. v. Abbott, 131 Mass. 397; Patton v. Springfield, 99 Mass. 627; Kent v. Whitney, 9 Allen (Mass.) 62.

[2] Bowers v. Connecticut River R. Co., 162 Mass. 312, 318; 38 N. E. 508.

[3] Bowers v. Connecticut River R. Co., supra.

[4] Whipple v. Rich, 180 Mass. 477; 63 N. E. 5 (1902); De Forge v. New York &c. R. Co., 178 Mass. 59, 64; 59 N. E. 669 (1901).

[5] Coffing v. Dodge, 169 Mass. 459, 461; 48 N. E. 840; West v. Platt, 127 Mass. 367; Baker v. Sanderson, 3 Pick. (Mass.) 348.

[6] Wolbrecht v. Baumgarten, 26 Ill. 291.

[7] 162 Mass. 397; 38 N. E. 974.

Act, was set aside by the trial court, and the ruling sustained by the supreme court.

§ 304. Correcting verdict as returned by jury.—The courts have large powers in the matter of correcting irregularities in the verdicts rendered by juries and may send out the jury to find a proper or corrected verdict in accordance with the intention of the jurors.[1]

In a recent case for personal injuries the jury were given two blank forms and returned a verdict in favor of the plaintiff without any statement of the amount of damages. Upon inquiry by the judge, the foreman stated that before separating the jury had found for the defendant, and that the foreman had signed the wrong paper. The presiding judge told the jury that if they wished they might retire and correct any mistake in the verdict, and they did so, and brought in a verdict for the defendant. It was held that the proceedings were within the authority of the court and that the verdict was proper.[2]

§ 305. Insurance against accidents — Argument of counsel.—The fact that an employer is insured against accidents to his employees is not a subject for legitimate argument to the jury by the plaintiff's counsel. In Tremblay v. Harnden (Mass.),[3] the defendant having admitted that he was insured against such injuries, the plaintiff's counsel claimed the right to argue to the jury that this fact rendered the defendant less likely to be careful in respect to his machinery. It was held that the presiding justice rightly refused to permit this line of argument.

[1] International Trust Co. v. Wilson, 161 Mass. 80; 36 N. E. 589; Spencer v. Williams, 160 Mass. 17; 35 N. E. 88; Pritchard v. Hennessey, 1 Gray (Mass.) 294; Capen v. Inhabitants &c., 16 Gray (Mass.) 364; Twomey v. Linnehan, 161 Mass. 91, 95; 36 N. E. 590.

[2] Levine v. Globe St. R. Co., 177 Mass. 204; 58 N. E. 685.

[3] 162 Mass. 383; 38 N. E. 972.

In Sawyer v. Arnold Shoe Co. (Me.)[1] evidence was admitted by the trial court to show the fact that the defendant was insured against accidents to its employees, of whom the plaintiff was one. "It is true," says Mr. Justice Wiswell for the court, "that the fact of insurance might have the effect of lessening the defendant's reason or motive for being careful. But the question was not as to how much or how little motive the defendant had for being careful, but whether or not it had in fact exercised due and reasonable care." It was therefore held that the evidence was incompetent and a new trial was granted.

In Anderson v. Duckworth (Mass.)[2] the court told the jury that the fact of insurance had nothing to do with the duty of the defendants to the plaintiff or their liability to him. It is well settled that insurance against liability for personal injuries to employees is a valid form of insurance and that such insurance may be lawfully issued by a foreign insurance company licensed to issue accident-policies, as well as by domestic insurance companies.[3]

§ 306. Allowance of exceptions—Amendment after time for filing original bill.—A bill of exceptions filed in court within the time allowed by law may be amended after that time has expired, with the consent of the excepting party, but not without his consent. The question of allowing such amendment, however, rests in the discretion of the presiding judge.[4] The facts in the case cited did not involve the question whether a distinct exception taken at the trial and omitted from the original draft by accident

[1] 90 Me. 369; 30 Atl. 333 (1897).

[2] 162 Mass. 251; 38 N. E. 510.

[3] Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404; 29 N. E. 529.

[4] Hector v. Boston Electric Light Co., 161 Mass. 558; 37 N. E. 773; 25 L. R. A. 554; Perry v. Breed, 117 Mass. 155, 164; Johnson v. Couillard, 4 Allen (Mass.) 446; McCarren v. McNulty, 7 Gray (Mass.) 139.

or mistake can be added by amendment after the time has expired for filing exceptions. On page 561 this question was expressly reserved for future consideration.

§ 307. Same—Proving truth of exceptions.—An excepting party has the right, if he chooses, to stand upon his exceptions as originally filed, and he can not be forced to accept an amendment. If the presiding judge will not allow them, the excepting party may prove their truth, and thus secure a hearing before the full court.[1] As to the extent to which errors in such exceptions may be corrected on a petition to prove the truth of the exceptions filed, see Morse v. Woodworth (Mass.).[2]

§ 308. Whether motion to nonsuit or direct verdict need state particulars.—A motion for a nonsuit at the close of the evidence, based on the ground that no negligence of the defendant had been shown, in an action by an employee against an employer, is a proper way to raise the question; and it is not necessary to state the particulars in the motion, in order to enable the defendant to avail himself of the point in a higher court.[3] In Massachusetts the usual form of motion is that upon all the evidence the plaintiff can not recover. In Alabama, if the jury believe the evidence their verdict should be for the defendant. If this motion be refused by the presiding justice, and a verdict be returned for the plaintiff, all grounds are open to the defendant in a higher court.[4]

Where there are two counts for the same cause of action in a suit for personal injuries, and there is no evidence to warrant a verdict for the plaintiff upon one of

[1] Hector v. Boston Electric Light Co., 161 Mass. 558, 560; 37 N. E. 773; 25 L. R. A. 554.

[2] 155 Mass. 233; 27 N. E. 1010; 29 N. E. 525.

[3] Byrnes v. New York &c. R. Co., 113 N. Y. 251; 21 N. E. 50.

[4] O'Neil v. O'Leary, 164 Mass. 387; 41 N. E. 662.

the counts, a general verdict for the plaintiff will be set aside, if a request was made at the trial to order a verdict for the defendant upon the unsupported count. In the case cited there were both a general and a special request.[1]

In England, however, under the County Court Act of 1888,[2] there is no right of appeal from a county court, except upon such questions of law as were raised and submitted to the county-court judge at the trial. This statute has been quite strictly construed against the right of appeal.[3] In a leading case under the Employers' Liability Act it was decided by the house of lords that, where the defendant at the trial in the county court relied merely upon the point that the plaintiff had assumed the risk of injury as a ground for a nonsuit, the point that there was no evidence of the defendant's negligence to go to the jury was not open to the defendant on appeal.[4]

§ 309. "Due care" should be explained to jury.—In an action under the Massachusetts act, where one of the defenses relied upon is that the plaintiff was not in the exercise of due care at the time of the injury, the plaintiff is entitled to a ruling that due care consists in the same care which people of ordinary prudence would exercise under like circumstances; and an exception will lie to a ruling that the plaintiff must have been in the exercise of "due care," or "proper care," without explanation of those terms.[5]

§ 310. Trial judge's decision that witness is an expert —When open to revision.—If the presiding judge decides that a witness offered as an expert is competent, the full

[1] Kilberg v. Berry, 166 Mass. 488; 44 N. E. 603.
[2] 51 and 52 Vict., cap. 43, § 120.
[3] Clarkson v. Musgrave, 9 Q. B. D. 386.
[4] Smith v. Baker, (1891) A. C. 325.
[5] Brick v. Bosworth, 162 Mass. 334; 39 N. E. 36.

court can not revise this finding of fact, unless all the material evidence bearing upon the question is set forth in the bill of exceptions or other record. Where it merely appears that he was an engineer, and that he was allowed to state that in his opinion a staging constructed in a particular mode would not bear a certain weight, the full court held that the question whether he was an expert was not open.[1]

In Alabama the rule seems to be less strict in this respect.[2]

§ 311. Reasonableness of employer's rules is a question of law for the court.—In Alabama and in Massachusetts it has been held that the question whether or not a rule adopted by an employer for governing the conduct of his employees is reasonable is a question of law for the presiding judge to decide, and should not be submitted to the jury.[3]

§ 312. Amendment in appellate court.—Where the statute gave the right of action to the widow for the negligent killing of her husband, and the administrator brought suit and recovered judgment in the lower court, which was reversed by the supreme court for the reason that the right of action was not vested in the administrator, it was held in Indiana that the supreme court had no power to substitute the widow as a party plaintiff, but must reverse and remand the cause to the lower court.[4]

[1] Prendible v. Connecticut River Mfg. Co., 160 Mass. 131; 35 N. E. 675; Campbell v. Russell, 139 Mass. 278; 1 N. E. 345; Perkins v. Stickney, 132 Mass. 217.

[2] Alabama &c. Coal Co. v. Pitts, 98 Ala. 285; 13 So. 135; Mobile &c. R. Co. v. George, 94 Ala. 199; 10 So. 145.

[3] Memphis &c. R. Co. v. Graham, 94 Ala. 545; 10 So. 283; Wills v. Lynn &c. R. Co., 129 Mass. 351; O'Neill v. Lynn &c. R. Co., 155 Mass. 371; 29 N. E. 630; Sweetland v. Lynn &c. R. Co., 177 Mass. 574, 579; 59 N. E. 443.

[4] Maule Coal Co. v. Partenheimer, 155 Ind. 100; 55 N. E. 751; 57 N. E. 710 (1900).

APPENDIX.

I. New York Employers' Liability Act.
II. Massachusetts Employers' Liability Act.
III. Alabama Employers' Liability Act.
IV. Indiana Employers' Liability Act.
V. Colorado Employers' Liability Act.
VI. Colorado Fellow Servants' Act.
VII. English Employers' Liability Act.

I.

NEW YORK EMPLOYERS' LIABILITY ACT.

(Laws 1902, ch. 600.)

AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees.

(Became a law April 15, 1902, with the approval of the governor. Passed, three-fifths being present.)

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Where, after this act takes effect, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and

entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition;

2. By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; the employee, or in case the injury results in death, the executor or administrator of a deceased employee who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employee suing under the provisions of this act.

Section 2. No action for recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured or by some one in his behalf, but if from physical or mental incapacity it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment, but no notice under the provisions of this section shall be deemed to be invalid or insuffi-

cient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby. The notice required by this section shall be served on the employer, or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation.

Section 3. An employee by entering upon or continuing in the service of the employer shall be presumed to have assented to the necessary risks of the occupation or employment and no others. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect, be considered as including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employees, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employees. In an action maintained for the recovery of damages for personal injuries to an employee received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employee continued in the service of the employer in the same place and course of employment after the discovery by such em-

ployee, or after he had been informed of, the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employee to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employee understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. An employee, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employee knew of the defect or negligence which caused the injury and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who had entrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employee.

Section 4. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries, for which compensation may be recovered under this act, or to any relief society or benefit fund created under the laws of this state, may prove in mitigation of damages recoverable by an employee under this act such proportion of the pecuniary benefit which has been received by such employee from such fund or society on account of such contribution of employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Section 5. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two of this act be a bar to the maintenance of a suit upon any such existing right of action.

Section 6. This act shall take effect July first, nineteen hundred and two.

II.

MASSACHUSETTS EMPLOYERS' LIABILITY ACT.

(Revised Laws 1902, ch. 106, §§ 71–79; St. 1887, ch. 270, with amendments to November 1, 1902.)

Section 71. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care, by reason of: Liability of employer to employee.

First. A defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or Defects.

Second. The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence, and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or Negligence of superintendent.

Third. The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive-engine or train upon a Negligent control of signal, etc.

railroad; the employee, or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of clause one of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause three of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive-engine or train shall be deemed to be a person in charge or control of a signal, switch, locomotive-engine or train within the meaning of said clause.

Action if injury followed by death not instantaneous or death with conscious suffering.

Section 72. If the injury described in the preceding section results in the death of the employee, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employee may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

If followed by instantaneous death or death without conscious suffering.

Section 73. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under the provisions of section seventy-one, an employee is instantly killed, or dies without conscious suffering, his

widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

Section 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable. Damages.

The amount of damages which may be awarded in an action under the provisions of section seventy-one for a personal injury to an employee, in which no damages for his death are awarded under the provisions of section seventy-two, shall not exceed four thousand dollars.

The amount of damages which may be awarded in such action if damages for his death are awarded under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employee and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering.

The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred nor more than five thousand dollars.

Section 75. No action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured, or by a person in Notice.

his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section.[1]

Liability of employer to employee of a contractor or subcontractor.

Section 76. If an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a subcontractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such con-

[1] Section 22 of Revised laws, 1902, ch. 51, reads as follows:

"Section 22. A defendant shall not avail himself in defense of any omission to state in such notice the time, place or cause of the injury or damage, unless, within five days after receipt of a notice, given within the time required by law and by an authorized person referring to the injuries sustained and claiming damages therefor, the person receiving such notice, or some person in his behalf, notifies in writing the person injured, his executor or administrator, or the person giving or serving such notice in his behalf, that his notice is insufficient and requests forthwith a written notice in compliance with law. If the person authorized to give such notice, within five days after the receipt of such request, gives a written notice complying with the law as to the time, place and cause of the injury or damage, such notice shall have the effect of the original notice, and shall be considered a part thereof."

tractor or subcontractor, caused by any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by him and if such defect arose, or had not been discovered or remedied, through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

Employer not liable when.

Section 77. An employee or his legal representatives shall not be entitled under the provisions of sections seventy-one to seventy-four, inclusive, to any right of action for damages against his employer if such employee knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who was entrusted with general superintendence.

Evidence in reduction of damages.

Section 78. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employee for personal injuries for which compensation may be recovered under the provisions of sections seventy-one to seventy-four, inclusive, or to any relief society formed under the provisions of sections seventeen, eighteen and nineteen of chapter one hundred and twenty-five, may prove in mitigation of the damages recoverable by an employee under the provisions of said sections, such proportion of the pecuniary benefit which has been received by such employee from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

Domestic servants, etc.

Section 79. The provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm-laborers by fellow employees.

III.

ALABAMA EMPLOYERS' LIABILITY ACT.

(Civil Code 1896, ch. 43, §§ 1749–1751; Acts of 1885, p. 115.)

EMPLOYER AND EMPLOYEE.

1749 (2590). Liability of master or employer to servant or employee for injuries.—When a personal injury is received by a servant or employee in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employee, as if he were a stranger, and not engaged in such service or employment, in the cases following:

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employee, at the time of the injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by

any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section, if the servant or employee knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

§ 1750 (2592). **Damages exempt.**—Damages recovered by the servant or employee, of and from the master or employer, are not subject to the payment of debts, or any legal liabilities incurred by him.

§ 1751 (2591). **Personal representative may sue if injury results in death.**—If such injury results in the death of the servant or employee, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions.

IV.

INDIANA EMPLOYERS' LIABILITY ACT.

(Burns' Rev. St. Ind. 1901; Acts 1893, ch. 130, p. 294.)

INJURIES TO EMPLOYEES.

§ 7083. Liability for personal injuries.—1. That every railroad or other corporation, except municipal, operating in this state, shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such ways, works, plant, tools, or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employee at the time of the injury was bound to conform and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph-office, switch-yard, shop, round-house, locomotive-engine, or train upon a railway, or where such injury was caused by the negli-

gence of any person, coemployee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee, or fellow servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

[**§ 7084. When damages not recoverable.**—2. Neither an employee nor his legal representative shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employee to palpable danger, nor where the injury was caused by the incompetency of the coemployee and such incompetency was known to the employee injured, or such injured employee, in the exercise of reasonable care, might have discovered such incompetency, unless the employee so injured gave, or caused to be given, information thereof to the corporation, or to some superior entrusted with the general superintendence of such coemployee, and such corporation failed or refused to discharge such incompetent employee within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the coemployee or superior and discharge him if found incompetent.][1]

§ 7085. Measure of damages.—3. The damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when in such case the action shall survive and be gov-

[1] This section was repealed by Indiana St. 1895, ch. 64, § 1, p. 148.

erned in all respects by the law now in force as to such actions: provided that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and pending such appeal the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

§ 7086. Laws of other states not a defense.—4. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured, as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state. [1]

§ 7087. Contracts of release void.—5. All contracts made by railroads or other corporations with their employees, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employee having a right of action under the provisions of this act, are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any suit or legal proceedings pending at the time it takes effect.

[1] See ante, §§ 56–58, in text.

V.

COLORADO EMPLOYERS' LIABILITY ACT.

(Session Laws 1893, ch. 77.)

AN ACT concerning damages sustained by agents, servants, or employees.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. Where, after the passage of this act, personal injury is caused to an employee who is himself in the exercise of due care and diligence at the time,—

(1) By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, and machinery were in proper condition; or

(2) By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence;

(3) By reason of the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive-engine, or train upon a railroad,—

the employee, or, in case the injury results in death, the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer as if the employee had not been an employee of or in the service of the employer, or engaged in his or its works.

Section 2. The amount of compensation recoverable under this act, in case of a personal injury resulting solely from the negligence of a coemployee, shall not exceed the sum of five thousand dollars. No action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury; provided it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

Section 3. Whenever an employer enters into a contract, either written or verbal, with an independent contractor, to do part of such employer's work, or whenever such contractor enters into a contract with a subcontractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or subcontract shall not bar the liability of the employer for injuries to the employees of such contractor or subcontractor by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person entrusted by him with the duty of seeing that they were in proper condition.

Section 4. An employee, or those entitled by law to sue and recover under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employee knew of the defect or negligence which caused the

injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of his employer who had entrusted to him some general superintendence.

Section 5. If the injury sustained by the employee is clearly the result of the negligence, carelessness, or misconduct of a coemployee, the coemployee shall be equally liable under the provisions of this act with the employer, and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action, the court may submit to, and require the jury to find a special verdict upon the question as to whether the employer or his vice-principal was or was not guilty of negligence proximately causing the injury complained of, or whether such injury resulted solely from the negligence of the coemployee; and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice-principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer, and the suit shall be dismissed as against the employee; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the coemployee, the jury may assess damages both against the employer and employee.

VI.

COLORADO FELLOW SERVANTS' ACT.

(Session Laws 1901, ch. 67.)

DAMAGES—COEMPLOYEE.

AN ACT to give a right of action against an employer for injuries or death resulting to his agents, employees, or servants, either from the employer's negligence or from the negligence of some of his other employees, servants or agents, and to repeal all acts and parts of acts in conflict herewith.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. That every corporation, company or individual who may employ agents, servants or employees, such agents, servants or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent, employee or servant, resulting from the carelessness, omission of duty or negligence of such employer, or which may have resulted from the carelessness, omission of duty or negligence of any other agent, servant or employee of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer.

Section 2. All acts, and parts of acts, in conflict herewith are hereby repealed; provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or in case of death, the right of the husband or wife, or other relatives of a deceased person, to maintain an action against the employer.

Approved March 28, 1901.

VII.

ENGLISH EMPLOYERS' LIABILITY ACT.

(43 & 44 Vict. cap. 42, 1880.)

AN ACT to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service. [7th September, 1880.]

Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. Where, after the commencement of this act, personal injury is caused to a workman Amendment of law.

(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer; or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive-engine, or train upon a railway,—

the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

2. A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases; that is to say,

Exceptions to amendment of law.

(1) Under subsection one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

(2) Under subsection four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of her majesty's principal secretaries of state, or by the board of trade or any other department of the government, under or by virtue of any act of parliament, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law.

(3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

3. The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury. Limit of sum recoverable as compensation.

4. An action for the recovery under this act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months, from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice. Limit of time for recovery of compensation.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman, in respect of any cause of action arising under this act, any penalty or part of a penalty which may have been paid in pursuance of any other act of parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this act, and payment has not previously been made of any penalty or part of a penalty under any other act of parliament in respect of the same cause of action, such workman, representatives, or person shall not be entitled thereafter to receive any penalty or part of a penalty under any Money payable under penalty to be deducted from compensation under act.

other act of parliament in respect of the same cause of action.

Trial of actions.

6. (1) Every action for recovery of compensation under this act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

(2) Upon the trial of any such action in a county court before the judge without a jury, one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"County court" shall, with respect to Scotland, mean the "sheriff's court," and shall, with respect to Ireland, mean the "civil bill court."

40 & 41 Vict. cap. 50.

In Scotland any action under this act may be removed to the court of session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the sheriff courts (Scotland) act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

7. Notice in respect of an injury under this act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. Mode of serving notice of injury.

The notice may be served by delivering the same to, or at the residence or place of business of, the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defense by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

8. For the purposes of this act, unless the context otherwise requires,—

The expression, "person who has superintendence entrusted to him," means a person whose sole or Definitions.

principal duty is that of superintendence, and who is not ordinarily engaged in manual labor:

The expression "employer" includes a body of persons corporate or unincorporate:

The expression "workman" means a railway-servant and any person to whom the Employers and Workmen Act, 1875, applies.

38 & 39 Vict. cap. 90.

9. This act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this act referred to as the commencement of this act.[1]

Commencement of act.

10. This act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of parliament, and no longer, unless parliament shall otherwise determine, and all actions commenced under this act before that period shall be continued as if the said act had not expired.[2]

Short title.

[1] This section, 9, is repealed by 57 & 58 Vict. cap. 56, Statute Law Revision Act, 1894.

[2] The Employers' Liability Act 1880, was continued in force until December 31, 1889, by 51 & 52 Vict. cap. 58, and has been continued since then by the Expiring Laws Continuance Act.

The following English colonies have also enacted Employers' Liability Acts: Ontario, 49 Vict. cap. 28; Victoria, 50 Vict. No. 894; Queensland, 50 Vict. No. 24; New Zealand, 46 Vict. No. 20; New South Wales, 46 Vict. No. 6.

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